Supreme Court, U.S.
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In The
Supreme Court of the United States

JAE WON JEONG,

Petitioner,

v.

TAIHEIYO CEMENT CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Eight

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the California Court of Appeal conflicts with *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), and violates fundamental principles of federalism and separation of powers, by preempting a California law extending the limitations period for wartime labor and personal injury claims, on the basis of a "policy" said to be implied by the 1951 Treaty of Peace with Japan, where the Treaty itself contains no express preemption, and where the "policy" was not expressed by any executive branch officials until they filed statements in recent litigation.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed, along with their capacities in that court, are as follows:

PETITIONER IN THIS COURT:

Jae Won Jeong, an individual, Real Party in Interest. (The complaint is pleaded as a class action on behalf of Mr. Jeong and all others similarly situated, but no class has been certified.)

RESPONDENTS IN THIS COURT:

Taiheiyo Cement Corp., a Japanese business association; Taiheiyo Cement U.S.A. Inc., a California corporation; California Portland Cement Co., a California corporation; Glacier Northwest, Inc. (formerly known as Lone Star Northwest, Inc.), a Washington corporation, Defendants and Petitioners.

Superior Court of the State of California for the County of Los Angeles, Respondent.

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OPINIONS BELOW

The judgment to be reviewed and the opinion of the California Court of Appeal, Second Appellate District, Division Eight, is reported as *Taiheiyo Cement Corp. v. Superior Court (Jeong)*, 117 Cal. App. 4th 380, 12 Cal. Rptr. 3d 32 (2004), and is reprinted at App. 1-App. 31. The earlier decision of the California Court of Appeal, Second Appellate District, Division Eight, is unofficially reported as *Taiheiyo Cement Corp. v. Superior Court (Jeong)*, 129 Cal. Rptr. 2d 451 (Cal. Ct. App. 2003), was previously officially published at 105 Cal. App. 4th 398, and is reprinted at App. 32-App. 70.

The grant of review by the California Supreme Court is reported at 66 P.3d 1231, 133 Cal. Rptr. 2d 157 (Cal. 2003) (*see* App. 4). The order of the California Supreme Court transferring the case to the California Court of Appeal is reported at 77 P.3d 2, 5 Cal. Rptr. 31 (Cal. 2003) (*see* App. 4). The order of the California Supreme Court denying review is not reported and is reprinted at App. 130.

The order of the United States District Court for the Central District of California remanding the case to state court is unpublished but is available at 2000 U.S. Dist. LEXIS 7985 (C.D. Cal. 2000), and is reprinted at App. 105-App. 129.

The orders of the Superior Court of California for the County of Los Angeles denying the Defendants' first and second motions for judgment on the pleadings, dated September 14, 2001, and November 29, 2001, are not reported, and are reprinted at App. 85-App. 104, and App. 71-App. 84, respectively.

JURISDICTION

The opinion and judgment of the California Court of Appeal of which review is sought was filed and entered on March 30, 2004. (App. 1.) The California Supreme Court denied discretionary review of that decision by order entered on July 14, 2004 (App. 130), and the petition is therefore timely under Sup. Ct. R. 13.1.

Petitioner believes that jurisdiction is conferred on this Court to review the order in question on a writ of certiorari by 28 U.S.C. § 1257(a).

The judgment of which review is sought is a final judgment rendered by the highest court of a State in which a decision could be had. The decision of the California Court of Appeal ordered the trial court to dismiss the action filed by Petitioner in the California state courts. (App. 26.) The California Supreme Court denied discretionary review (App. 130), and no further review of the decision of the Court of Appeal is available in the California courts, *see, e.g., Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384 (1990). The judgment below is therefore final. *Bd. of Comm'rs v. Lucas*, 93 U.S. 108, 109 (1876).

In this case, the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, laws, and treaties of the United States. In particular, the California Court of Appeal held that section 354.6 of the California Code of Civil Procedure "is unconstitutional because it conflicts with the federal policy embodied in" the Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (App. 134-App. 164).

Because the decision below holds that California Code of Civil Procedure section 354.6 is unconstitutional, it appears that 28 U.S.C. § 2403 may apply. The State of California, through its Attorney General, was notified of the proceeding below and appeared as amicus curiae before both the Superior Court and the Court of Appeal, defending the constitutionality of section 354.6. The California Attorney General is being served with a copy of this Petition, as required by Sup. Ct. R. 29.4(c). A copy of the Petition is also being served on the Solicitor General of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND TREATIES INVOLVED

United States Constitution, Article I, Section 8, provides, in part, as follows:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States [cl. 1]; . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes [cl. 3]; . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations [cl. 10]; To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water [cl. 11]; To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years [cl. 12]; To provide and maintain a Navy [cl. 13]; To make Rules

> for the Government and Regulation of the land and naval Forces [cl. 14].

United States Constitution, Article I, Section 10, Clause 1, provides, in part, as follows:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal. . . .

United States Constitution, Article I, Section 10, Clause 3, provides, in part, as follows:

> No State shall, without the Consent of Congress, . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

United States Constitution, Article II, Section 2, Clauses 1 and 2, and Article II, Section 3, provide, in part, as follows:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . . [§ 2, cl. 1]

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls. . . . [§ 2, cl. 2]

> . . . [H]e shall receive Ambassadors and other public Ministers. . . . [§ 3]

United States Constitution, Article VI, Clause 2, provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment X, provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

California Code of Civil Procedure section 354.6 and its accompanying statutory notes are set out in the appendix at App. 131-App. 133.

The Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, is set out in the appendix at App. 134-App. 164.

STATEMENT OF THE CASE

I. The Statute at Issue.

In 1999, the California Legislature unanimously enacted section 354.6, extending the statute of limitations for a defined class of claims relating to forced or slave labor performed between 1929 and 1945. The statute and its accompanying notes are set out at App. 131-App. 134.

The statute allows any "Second World War slave labor victim" or "forced labor victim," as defined, or their heirs, to "bring an action to recover compensation for labor performed as a . . . slave labor victim or . . . forced labor victim from any entity or successor in interest thereof, for whom that labor was performed." Cal. Civ. Proc. Code § 354.6(b) (West Supp. 2004) (App. 132). The statute provides that California courts have jurisdiction over such actions. *Id.*

The Legislature took the additional step of enacting its intent: "California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." 1999 Cal. Stat. ch. 216, § 1(c) (App. 133).

The statute provides that "[a]ny action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010." Cal. Civ. Proc. Code § 354.6(c) (West Supp. 2004) (App. 132). The limitations extension is retroactive. 1999 Cal. Stat. ch. 216, § 1(d) (App. 132).

II. Mr. Jeong's Forced Labor.

Petitioner Jae Won Jeong seeks to recover compensation for unpaid labor and personal injuries. Mr. Jeong, who is now a United States citizen and California resident, was

a Korean national at the time. (App. 5; Tab 1, at 11.[1]) Mr. Jeong alleges that, in January 1944, he, then a university student in Japan, was taken by force to a slave labor camp in Korea operated by Onoda Cement Co., Ltd., now Respondent Taiheiyo Cement Corporation, and that, in 1944-45, he, along with other Korean nationals, was subjected to physical and mental torture and forced to perform hard physical labor without compensation. (App. 86-App. 87; Tab 1, at 13.)

III. The State Court Action and its Removal and Remand.

On October 4, 1999, Mr. Jeong filed an action in Los Angeles County Superior Court against Onoda, Taiheiyo, and three of Taiheiyo's subsidiaries [hereinafter collectively Taiheiyo]. Mr. Jeong sought compensation for his labor, for unjust enrichment, and for injuries in tort, including battery, intentional infliction of emotional distress, and unlawful imprisonment, and relief for unfair business practices under California Business and Professions Code section 17200 et seq. (App. 86-App. 87; Tab 1, at 1, 15-20).

Taiheiyo removed the action. The United States District Court remanded it. *Jeong v. Onoda Cement Co.*, 2000 U.S. Dist. LEXIS 7985 (C.D. Cal. 2000) (App. 105-App. 129).

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[1] Tab references are to the nine-volume Appendix of Exhibits in Support of Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief, filed in the California Court of Appeal.

IV. The Denial of Taiheiyo's Two Motions for Judgment on the Pleadings.

Taiheiyo moved for judgment on the pleadings on, among other grounds, that Mr. Jeong's claims were barred by the Treaty of Peace with Japan of 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45 (1951) (App. 134-App. 164) (1951 Treaty), and the Agreement between Japan and the Republic of Korea, June 22, 1965, 583 U.N.T.S. 173 (1965) (1965 Agreement) (Tab 7, at 315). (*See* Tabs 4, 5.) The Superior Court denied the motion, concluding that (1) the 1951 Treaty did not apply to Korean nationals like Mr. Jeong because Korea was not a signatory to the treaty, (2) the 1965 Agreement did not preempt state law or bar Mr. Jeong's claims, and (3) no other federal law expressly or impliedly preempted section 354.6. (App. 71-App. 84.)

Taiheiyo then filed a second motion for judgment on the pleadings, citing an intervening federal district court holding that section 354.6 interfered with the federal government's exclusive power over foreign affairs and was unconstitutional under *Zschernig v. Miller*, 389 U.S. 429 (1968), *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1173 (N.D. Cal. 2001), *aff'd sub nom. Deutsch v. Turner*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Suk Yoon Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 124 S. Ct. 105 (2003). (App. 72; Tabs 21, 22.)

The Superior Court again denied Taiheiyo's motion. It disagreed with the district court's application of *Zschernig*, and concluded that section 354.6 had no direct impact on foreign relations. The court also ruled that section 354.6 did not violate due process, but rather legitimately extended

statutes of limitations that would otherwise bar claims by slave or forced labor victims. (App. 71-App. 84.)

V. Taiheiyo's Petition for Writ of Mandate and the Decisions Below.

After the denial of its second motion, Taiheiyo filed a petition for writ of mandate in the California Court of Appeal. The court, after issuing an order to show cause, denied the petition on January 15, 2003. *Taiheiyo Cement Corp. v. Superior Court (Jeong)*, 129 Cal. Rptr. 2d 451 (2003) [*Taiheiyo I*] (App. 32-App. 70). The court held:

> We therefore conclude section 354.6 is valid because (1) no federal treaty or other law preempts it, (2) the enactment poses at most merely an incidental or indirect effect on foreign countries, (3) the statute does not violate constitutional due process, and (4) the claims it allows do not present non-justiciable political questions.

Taiheiyo I, 129 Cal. Rptr. 2d at 472 (App. 69). The Court found that neither the 1951 Treaty nor the 1965 Japan-Korea Agreement preempted Mr. Jeong's claims against Taiheiyo. *Id.* at 458-61 (App. 40-App. 47).

Taiheiyo filed a petition for rehearing based upon the grant of certiorari by this Court in *Gerling Global Reins. Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002), *cert. granted sub nom. American Ins. Ass'n v. Garamendi*, 537 U.S. 1100 (2003), and the Ninth Circuit's decision in *Deutsch*. The Court of Appeal denied the petition.

On April 30, 2003, the California Supreme Court granted Taiheiyo's petition for review, *Taiheiyo Cement Corp. v. Superior Court (Jeong)*, 66 P.3d 1231, 133 Cal. Rptr. 2d 147 (Cal. 2003), and, on May 21, 2003, stayed

briefing pending a decision in *Garamendi*. This Court's decision in *Garamendi* was issued on June 23, 2003. *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 123 S. Ct. 2374 (2003).

On September 24, 2003, the California Supreme Court vacated the Court of Appeal's decision, and transferred the case to the Court of Appeal with directions to reconsider it in light of *Garamendi*. *Taiheiyo Cement Corp. v. Superior Court (Jeong)*, 77 P.3d 2, 5 Cal. Rptr. 3d 31 (Cal. 2003). (*See* App. 4.)

On remand, the Court of Appeal reversed its earlier decision. It stated that "*Garamendi* . . . compels us to conclude section 354.6 is unconstitutional." (App. 6.) It held that "Articles 4(a) and 26 [of the 1951 Treaty] embody the federal purpose and foreign policy that WWII claims by individuals of non-signatory nations were to be resolved through diplomacy" (App. 16), and that section 354.6 "conflicts with Article 4(a)'s expression of foreign policy," (App. 20).

On this basis, the Court of Appeal granted Taiheiyo's petition for writ of mandate, and ordered that the case be dismissed. (App. 26). On July 14, 2004, the California Supreme Court denied review. (App. 130.)

In its first decision, the Court of Appeal established:

1. "Nothing in [article 14(a)] or any other provision of the 1951 Treaty expressly preempts or bars claims by Korean nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WWII. To the contrary, the treaty recognized the waiver provision of Article 14 was to have

no effect on the claims of non-signatory nations." 129 Cal. Rptr. 2d at 458 (App. 42).

2. "The 1951 Treaty did not address claims between Korean and Japanese nationals because the Allied Powers had no authority to bind Korea, which was not a signatory nation to the Treaty." *Id.* at 458-59 (App. 42).

3. "The 1951 Treaty, however, provides that claims between Korean and Japanese nationals were to be the subject of separate arrangements between the two countries. Specifically, Article 4(a), which addressed Japan's post-war relationship with Korea, provides that 'the disposition of property of Japan and of its nationals . . . and their claims, including debts, against [Korea] . . . , and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities.' (1951 Treaty, *supra*, 3 U.S.T. at p. 3173.)" *Id.* at 459 (App. 42).

4. "Korea benefited from Article 4(a)'s requirement that Japan enter into future negotiations concerning the resolution of war claims. However, neither Japan nor Korea was required to implement any specific resolution. Indeed, Korea was under no obligation to even negotiate with Japan concerning the settlement of war claims. Further, another treaty provision [article 26] required Japan, as part of any future arrangements with non-signatory nations, to provide them 'the same or substantially the same terms' as to the signatory nations. However, even that obligation, binding only on Japan, expired after three years." *Id.* (footnotes omitted) (App. 42-App. 43).

5. "Taiheiyo does not contend in its petition that the [1965 Japan-Korea Agreement] expressly preempts Jeong's claims under section 354.6." *Id.* n.5 (App. 43 n.5).

The Government accepted these propositions. It stated:

1. "We are not saying that the claims of Korea were waived under the [1951] Treaty." (Tab 36, at 1883.)

2. "We don't take a position with respect to the [1965] Japan[-ROK] Agreement or accord because we are not a party to that agreement." (*Id.*)

The Court of Appeal's opinion now under review does not question these points.

REASONS FOR GRANTING THE WRIT

Introduction.

The decision below unwarrantedly transfers enormous powers from the States and Congress to the executive branch, and raises grave separation of powers and federalism concerns. The Court of Appeal struck down a California statute – one that extends the limitations period for some state-law claims for pay and injury for forced labor in the World War II period – as preempted by a "policy" the court thought was "embodied" in a treaty – the 1951 Japanese Peace treaty – even though the court conceded it was not in the Treaty itself, and even though the court did not find that the policy was expressed unmistakably in the Treaty. In so doing, the court misinterpreted *American Insurance Association v. Garamendi*, 539 U.S. 396, 123

S. Ct. 2374 (2003), in a way that threatens fundamental principles of federalism and separation of powers.

Instead of following the Court of Appeal down this dangerous path, this Court should clarify that *Garamendi* does not provide a blank check to the Executive Branch to unilaterally preempt any state law, no matter that law's subject matter, based on mere statements of policy filed only in the context of a particular litigation. Rather, as this Court instructed in *Garamendi*, the Court of Appeal was required to find whether there was a federal policy expressed unmistakably in the 1951 Treaty, and, if there was, to balance California's powerful and traditional interest in allowing legal remedies for its citizens and administering litigation in its courts against that federal policy. Only if, after conducting this balancing, a sufficiently clear conflict exists, may preemption occur. The Court of Appeal failed to engage in any of the balancing analysis carefully laid out in *Garamendi*.

Garamendi teaches that a national policy must be "expressed unmistakably" in a treaty or executive agreement for it to preempt a State law. 123 S. Ct. 2374 at 2390. Here, there *are no* contemporaneous executive branch statements comparable to those in *Garamendi*, *see id.* at 2390-91, that support the notion that the 1951 Treaty preempts the state statute. Instead, the court relied on the language of the Treaty encouraging Japan to negotiate with Korea and China. (App. 4, 6.) This language, however, does not express such preemption, unmistakably or otherwise.

Moreover, the United States has not even maintained a consistent understanding of the so-called "policy" of the 1951 Treaty. For instance, it conceded below (*see infra* pp.

18-19) that Mr. Jeong *could have sued* in the United States earlier but for statutes of limitations, and Taiheiyo similarly conceded that Mr. Jeong could have sued in the United States under the Alien Tort Statute, but for that law's limitations period. If that suit, which must be "for a tort only," 28 U.S.C. § 1350, would not have violated the policy of the 1951 Treaty, then a state-court suit for a tort could not have violated it either. Since the statute at issue extends the limitations period for such a suit, Mr. Jeong's action is proper.

This Court's intervention is urgently needed to correct the lower court's mistaken application of *Garamendi* – one that undermines basic principles of federalism and separation of powers. Under the Constitution, the federal government has jurisdiction of "certain enumerated objects only . . . leav[ing] to the several States a residuary and inviolable sovereignty over all other objects." *The Federalist* No. 39 (James Madison). "'[T]he "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties,"'" and so the courts "strive to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002). The decision below disrupts that balance by reading an executive policy statement made in the context of litigation that is *not* unmistakably expressed in a treaty to preempt a state law regulating a matter of traditional state interest.

This Court should grant certiorari to ensure that this dangerous application of *Garamendi* does not alter the

proper federal-state balance required by the Constitution and by this Court's precedents.

I. The Court of Appeal Failed to Correctly Apply *Garamendi*.

A. *Garamendi* Requires a "Clear Conflict" with a National Policy "Expressed Unmistakably" by International Agreements.

In *Garamendi*, this Court held that State law must give way to the federal policy when there is "clear conflict between the policies adopted by the two." *Garamendi*, 123 S. Ct. at 2390. This "clear conflict" existed because the California law mandated disclosure of Holocaust-era policies by foreign insurance companies whereas "the national position, expressed unmistakably in the executive agreements" sought to persuade European insurers to voluntarily develop claim procedures and disclosure policies. *Id.*

This Court found an *express* "'policy of the U. S. Government' 'to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation.'" 123 S. Ct. at 2390. It also found that this policy was "expressed unmistakably in the executive agreements." *Id.*

The claim procedures established under the International Commission on Holocaust Era Insurance Claims (ICHEIC), were, the Court explained, an integral part of this policy. The international agreement known as the German Foundation Agreement was declared "to be the '*exclusive forum*' for demands against German companies," and provided for insurance claims to be "resolved under procedures developed through negotiation with the

ICHEIC." *Id.* (emphasis added). The U.S. Government stated at the time that it had "'supported [the ICHEIC] since it began, and we believe *it should be considered the exclusive remedy* for resolving insurance claims from the World War II era.'" *Id.* (emphasis added) (quoting statement of Deputy Secretary Eizenstat). The Government position was that "a company's participation in the ICHEIC should give it '"safe haven" from sanctions, subpoenas, and hearings relative to the Holocaust period.'" *Id.* at 2391 (quoting Eizenstat testimony). This policy included how insurance information was to be disclosed – the subject of HVIRA. The agreements contained "*express endorsement* of the ICHEIC's voluntary mechanism, *which encompasses production of policy information*, not just actual payment of unpaid claims." *Id.* n.13 (emphasis added).

B. The Court of Appeal Erred by Striking Down the California Statute Even Though It Did Not Find a National Policy "Expressed Unmistakably" in the 1951 Treaty.

The Court of Appeal reduced *Garamendi*'s requirement of an "unmistakable" national policy into a far less searching test. In the Court of Appeal's formulation, the 1951 Treaty "embod[ied]" a "federal purpose and policy that WWII claims by individuals of non-signatory nations were to be resolved through diplomacy." (App. 16.) This is too flimsy a basis on which to annul the California statute.

The Court of Appeal did not determine that some sort of national policy for "diplomacy" as the *exclusive* remedy by which nationals of non-signatory countries could ever be compensated was "expressed unmistakably" in the 1951 Treaty. Whereas the *Garamendi* executive agreements

created a complex "mechanism of voluntary settlement," which were deemed the "exclusive forum[s]" and "exclusive remed[ies]", article 4(a) of the 1951 Treaty simply states that wartime claims of non-party nationals "shall be the subject of special arrangements between Japan and . . . [Korean] authorities." (App. 137.)

As the Court of Appeal correctly noted in its first decision, under article 4(a), "neither Japan nor Korea was required to implement any specific resolution. Indeed, Korea was under no obligation to even negotiate with Japan concerning the settlement of war claims." 129 Cal. Rptr. 2d at 459 (App. 42-App. 43). This provision was directed at the defeated power, Japan, to encourage it to resolve claims by victims of its aggression. *See generally In re World War II Era Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1168 (N.D. Cal. 2001) (section 4(a) is "'hortatory rather than mandatory'"), *aff'd sub nom. Deutsch v. Turner*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Suk Yoon Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 124 S. Ct. 105 (2003).

The Court of Appeal in its second decision cited no contemporaneous statements by the United States analogous to those in *Garamendi*, stating that it was U.S. policy that these hoped-for negotiations would somehow constitute *an exclusive remedy* for the Koreans and others who had suffered so grievously at the hands of Japanese corporations, even when Korea had no seat at the table in San Francisco, and was in the midst of a war in which its political existence was at stake. In the absence of such an unmistakable, express policy, *Garamendi* preemption does not occur.

The Court of Appeal appeared to accept the characterization of the "federal policy" provided by the United States as amicus curiae. The naked statements of interest by the DOJ in a piece of litigation do not suffice.

This Court in *Garamendi* focused on the statements of those high-level executive officials responsible for negotiating the relevant international agreements and for administering the national policy embodied in those agreements. Such statements, the Court explained, are useful because they "faithfully represent[]" the policy set forth by the agreement. 123 S. Ct. at 2391 n.13.

The DOJ's statements here – statements developed for litigation – cannot be characterized in the same way. "Courts tend to give less weight to an executive branch position adopted in the course of litigation . . . than to an interpretation made in diplomatic relations with other countries." *United States v. Lombera-Camorlinga*, 206 F.3d 882, 887 (9th Cir. 2000); Restatement (Third) of Foreign Relations Law § 326 reporters' note 2 ("Courts are more likely to defer to an Executive interpretation previously made in diplomatic negotiation with other countries . . . than one adopted by the Executive in relation to a case before the courts. . . .").

Moreover, the Government has, in the course of this litigation, expressed contradictory views on the policy embodied in the 1951 Treaty, at the least undermining its own rationale for its purported policy. In the Superior Court, for instance, the United States argued that Korean nationals could have brought suits in California under the original statute of limitations, but that California could not adjust the statute of limitations to permit claims today. The Government told the court:

> Well, as an initial matter, [Mr. Jeong] for over the past 50 years [could] have sued in Korea or sued in Japan. So there's been ample time now and opportunity over an extended period of time to sue, not to mention the fact that there's other statutes, statutes that have long since gone, that probably could have taken advantage in the United States, you know, many years ago.

(Tab 36 at 1890; *see also id.* at 1891 ("And like I said, all of these individuals had ample opportunity to file these claims in their own country or in Japan or *even in the United States* years ago and didn't take advantage of it.") *Id.* at 1891 (emphasis added).) If Mr. Jeong could have brought his suit in the past without foreign policy preemption, there is no reason why California cannot extend its statute of limitations to allow him to do the same today.

The United States' admission unmakes the claim that the 1951 Treaty embodies a "clear policy" – or any policy – on preemption. If Mr. Jeong could have brought his private claim in American courts as long as the statute of limitations for the claim had not expired, then there cannot be a "clear policy" that such claims must be "resolved through diplomacy" – the heart of the case for preemption (App. 16). Taiheiyo cannot square this circle, as it sought to do below, by claiming that the policy embodied in the 1951 Treaty preempted only state-law claims, not federal claims under the Alien Tort Statute, 28 U.S.C. § 1350. (Answer to Pet. for Review at 18.) First, the government statements in question do not identify a policy of preempting state laws only. (*See* Tab 36 at 1890.) Indeed, the Alien Tort Statute has as one of its elements that a "tort" have been committed. *See, e.g., Kadic v. Karadžić*, 70 F.3d 232, 238 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996).

Second, there is nothing in the 1951 Treaty or in any executive statements related to the Treaty, or even in Japan's statements about the Treaty, that suggest the policy of preemption is limited to state-law claims. Indeed, such a policy would be incoherent if, as Taiheiyo claims, the purpose of the 1951 Treaty "embodies a foreign policy that Jeong's claims must be resolved through diplomatic negotiations." (*See* Answer to Pet. For Review at 15.) A policy of diplomatic negotiations would preclude claims in both federal and state courts.

The contrast between the inconsistent or incoherent statements of policy in this case with the statements in *Garamendi* is instructive. The *Garamendi* Court found "no suggestion that these high-level executive officials were not faithfully representing the President's chosen policy." 123 S. Ct. at 2391 n.13. In this case, an executive branch official has claimed that the policy embodied in the 1951 Treaty did not preclude private claims, so long as the relevant statute of limitations had not run. Other executive statements appear to suggest a different policy. These contradictory statements surely establish that the policy the Court of Appeal believed was embodied in the 1951 Treaty was far from "expressed unmistakably."

Such inconsistencies, as this Court has explained, show why such executive representations cannot be a reliable replacement for independent judicial decision-making. *See Zschernig v. Miller*, 389 U.S. 429, 434 (1968) (rejecting United States statement of interest stating there was no foreign policy conflict); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436 (1963) ("It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to a probable result and, at any rate, should a

prediction be wrong, the Executive might be embarrassed in its dealings with other countries.").[2]

The Court of Appeal also uncritically accepted (*see* App. 18-App. 19), the assertion by the D.C. Circuit in a now-vacated decision that, "[a]s a matter of foreign policy it would be odd indeed for the United States, on the one hand, to waive all claims of its nationals against Japan and, on the other hand, to allow non-nationals to proceed against Japan in its courts." *Hwang Geum Joo v. Japan*, 332 F.3d 679, 685 (D.C. Cir. 2003), *vacated and remanded*, 124 S. Ct. 2835 (2004). That court, however, reached a judgment on grounds not presented here – the scope of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. *See* 332 F.3d at 686.

The D.C. Circuit's repetition of the views of the United States is not even persuasive on its own terms. There are many reasons why the United States would – after making due statutory provision, *see* War Claims Act of 1948, 50 U.S.C. app. §§ 2001-2017p – waive claims of its own citizens, but not those of nationals of non-signatory countries, for whom no such provision was made. In San Francisco, the Allies, including the United States, were representing their own nationals. It is not surprising that they would make agreements concerning their own nationals and not the nationals of countries that were not

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[2] Nor do the self-serving statements of Japan resolve the issue, as the Court of Appeal observed in its first opinion. 129 Cal. Rptr. 2d at 466 (App. 57) ("courts cannot tailor their decisions to accommodate the displeasure of non-party foreign governments") (citing *Patrickson v. Dole Food Co., Inc.*, 251 F.3d 795, 803-04 (9th Cir. 2001) (Kozinski, J.), *aff'd on other grounds*, 538 U.S. 468 (2003)). The second opinion does not rely on these statements.

present at the conference and that did not sign the treaty. It is even less surprising that the Allies would not make agreements that purported to *bind* the nationals of non-signatory countries. And they did not. Instead, claims by Koreans and other non-signatory nationals are left open by the Treaty. *Cf. Mitsubishi Maters. Corp. v. Superior Court (Dillman)*, 113 Cal. App. 4th 55, 70, 6 Cal. Rptr. 3d 159, 170 (2003) (applying *express* waiver for nationals of *signatory* countries under article 14(a) of 1951 Treaty).

II. The Court of Appeal's Misreading of *Garamendi* Raises Serious Federalism and Separation of Powers Concerns.

Under the Court of Appeal's view, even if the text of a treaty does not preempt a state law, a mere executive statement, made in the context of litigation, that a policy is "embodied" in the agreement can transform a treaty into a broad preemptive force. Not only is this view inconsistent with the actual decision in *Garamendi*, but, if accepted, it would result in an enormous transfer of authority from the States and Congress to the Executive in violation of basic principles of separation of powers and federalism.

The Constitution erects a particular structure of foreign affairs powers. It creates a delicate balance between the States, the Congress, and the President, limiting each institution to its own lawmaking sphere.

Article I, Section 10, contains specific limitations on the power of the States in that field. Article 2, Section 2, grants Congress and the President power to enact legislation and to make treaties, both of which are the "supreme Law of the Land" under Article VI. The Tenth Amendment

commands, however, that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States . . ."

The present California statute is in none of the prohibited categories, and no intention to preempt it has been unmistakably expressed in a federal treaty or law. By nonetheless preempting the State law, the Court of Appeal has disrupted this constitutional equilibrium.

As Chief Justice Marshall recognized, "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature. . . ." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). As "the law of the land," treaties form "a rule of decision in all courts." *Strother v. Lucas*, 37 U.S. (12 Pet.) 410, 439 (1838). Where a treaty creates rights "of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Head Money Cases*, 112 U.S. 580, 599 (1884). As with a statute, therefore, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

This Court's precedents conform to this understanding. Thus, while government interpretations of treaties "merit[] respect," and, in some instances, deserve "great weight," *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999), the Court of Appeal was wrong to treat such views as conclusive with respect to a federal policy "embodied" in the 1951 Treaty. Indeed, this Court has not hesitated to reject the views of the United States on the proper interpretation of a treaty. *See, e.g., Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (rejecting

views of United States on proper interpretation of Warsaw Convention). *Cf. Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2255 (2004) (United States' views on the interpretation of a statute, there, the FSIA – as opposed to its views on "the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct" – "merit no special deference") (emphasis in the original)).

The Court of Appeal's approach undercuts this basic constitutional framework. Such an approach not only removes any judicial protections for States' autonomy and independence, but it renders the Senate's advice and consent irrelevant as well.

As the Court of Appeal has noted, the 1951 Treaty itself does not preempt state law. *Taiheiyo I*, 129 Cal. Rptr. 2d at 458 (App. 42). The court below points to no statement by those responsible for negotiating the 1951 treaty – as opposed to current executive statements made in litigation – that "express[ly] endorses" an *exclusive* diplomatic mechanism for resolving non-signatories' claims.

Without an independent judicial determination of the Treaty's policy based on the statements of those involved in the actual negotiation and creation of the treaty, the power to preempt state law is held solely by any particular administration. It is then free to change its interpretation of the "policy" as it sees fit.

This Court has consistently rejected similar attempts to conform a treaty to policy preferences through after-the-fact declarations. *See The Diamond Rings*, 183 U.S. 176 (1901) ("The meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."); *Perkins v. Elg*, 307 U.S. 325, 335-42 (1939) (refusing to follow the executive branch's reinterpretation of

a naturalization treaty); *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 10 (1936) (disagreeing with a claim that the Executive had certain implied discretionary powers under an extradition treaty); *Rainbow Navigation, Inc. v. Dep't of Navy*, 686 F. Supp. 354, 358-60 (D.D.C. 1988) (interpreting a treaty contrary to the view offered by the executive that it was not self-executing and thus created no rights enforceable by the plaintiff). The "concept" that giving "'great weight'" to the Executive's position "necessarily must yield concurrence" would reduce a court's "constitutional role and discretion in treaty interpretation . . . to that of a mere echo of the Government's perspective." *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 393 (S.D.N.Y. 2002); *see also id.* at 392 (denying government's claim that "'failure to give deference to Executive branch's treaty interpretation is likely to interfere in the conduct of foreign affairs.'"). As Justice Story noted, "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. . . . Neither can this Court supply a *casus omissus* in a treaty, any more than in a law." *The Amiable Isabella,* 19 U.S. (6 Wheat.) 1, 71 (1821), *quoted in Chan*, 490 U.S. at 135.

III. The Court of Appeal Failed to Follow *Garamendi*'s Instructions to Balance National Policy Against California's Traditional and Powerful Interest in Permitting Claims for Wages and Personal Injuries.

In addition to its mistaken determination of the national policy toward non-signatories embodied in the 1951 Treaty, the Court of Appeal failed to balance California's traditional and powerful interest in administering

litigation in its courts and providing a forum for its people in order to assess whether a serious conflict requiring preemption has been created. Rather than simply assessing conflicts between state and foreign policy, the *Garamendi* Court considered "the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Garamendi*, 123 S. Ct. at 2389. Such balancing is necessary before a court can find a "sufficiently clear conflict" requiring preemption. *Id.* at 2390.

Instead of engaging in such balancing, however, the Court of Appeal simply brushed aside California's attempt to revise its statute of limitations in section 354.6 as "noble," but in conflict with federal policy. (App. 22.) Such a cursory dismissal of state interests conflicts with the kind of balancing required by *Garamendi*.

Section 354.6 vindicates the right of individuals to seek redress of individual grievances. *Taiheiyo I*, 129 Cal. Rptr. 2d at 460-61 (App. 44-App.48). The States, moreover, possess broad police powers to protect workers. *See, e.g., Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). California has a long history of protecting the rights of its workers. *See, e.g.,* Cal. Const. art. I, § 6 (prohibiting slavery); Cal. Const. art. XIV, § 1 (authority to "provide for minimum wages and for the general welfare of employees"); *Ass'n of Cmty. Orgs. for Reform Now v. State*, 41 Cal. App. 4th 298, 301-01, 48 Cal. Rptr. 2d 486, 488 (1995) (compelling state interests in adequate wages and "freedom from oppression" of workers).

Moreover, the principle that a forum State may craft its own statute of limitations has "gone essentially unchallenged" and has been "'practiced for two hundred years by

common consent.'" *Sun Oil Co. v. Wortman,* 486 U.S. 717, 730 (1988) (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)). "A State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated . . . is as old as the Republic." *Id.* A State, too, has a fundamental "interest in fashioning its own rules of tort law." *Martinez v. California*, 444 U.S. 277, 282 (1980).

Indeed, *Garamendi* recognized that a State may have a powerful interest "by virtue of the fact that California seeks to vindicate claims of" victims of World War II-era slave and forced labor. *See* 123 S. Ct. at 2393. This powerful interest was preempted there only because "the *very same objective* dignifies the interest of the National Government in devising its chosen mechanism for voluntary settlements," *id.* (emphasis added); the objective was also "an express object of diplomacy today," *id.* at 2390. In contrast, here, the federal government has no objective or policy with respect to Mr. Jeong and other non-signatory nationals who were victims of Japanese forced labor that would justify preemption, and there is no relevant ongoing diplomatic effort.

The approach of the court below also ignores the long history of State control of litigation, including litigation that involves disputes affected by war. For instance, State courts have played a central role in the application of international law rules governing the effect of war on contracts with enemy aliens. Citing international law, the California Supreme Court tolled California's statute of limitations for probate claims during wartime with respect to an inheritance claim. *In re Caravas' Estate*, 40 Cal. 2d 33, 250 P.2d 593 (1952). State control of litigation involving the effect of war on enemy alien claims is uncontroversial,

longstanding, and commonplace. *See, e.g., In re Kielsmark's Will*, 188 Iowa 1378, 177 N.W. 690 (1920) (applying international law of war to permit enemy alien Germans to inherit under Iowa will); *Kristel v. Mich. Cent. R.R. Co.*, 213 Ill. App. 518 (1919) (permitting enemy alien Austrian to pursue lawsuit against Michigan railroad).

Indeed, the first Congress recognized that States would provide a forum for litigation involving aliens under international law when, in the original version of what is now known as the Alien Tort Statute, 28 U.S.C. § 1350, it made federal court jurisdiction over alien lawsuits for violations of the law of nations "concurrent with the courts of the several States." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76-77. This provision presumed that State courts could provide forums for aliens seeking to vindicate violations of the law of nations.

Hence, the fact that California sought to permit wartime victims to pursue compensation hardly, by itself, constitutes an impermissible intrusion into foreign affairs. As this Court in *Garamendi* recognized by refusing to adopt *Zschernig*'s absolutist approach, until a "clear conflict" arises between an "unmistakably expressed" national policy, California is free to enact such legislation if, as here, it falls within the State's traditional legislative competence.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 2004

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TAIHEIYO CEMENT CORPORATION et al., Petitioners, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent. --- JAE WON JEONG, Real Party in Interest.	B155736 (Super. Ct. No. BC 217805)

(Filed Mar. 30, 2004)

ORIGINAL PROCEEDING in mandate. Peter D. Lichtman, Judge. Petition granted.

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O'Melveny & Myers, John F. Niblock; McCutchen, Doyle, Brown & Enersen, David M. Balabanian; Morrison & Foerster, Lloyd Aubry, Arne D. Wagner; Pillsbury Winthrop, Barbara Croutch; Bingham Dana, Matthew Digby; Bingham McCutchen, Matthew Digby; and Sullivan & Cromwell and Robert A. Sacks for Mitsubishi Materials Corp., Mitsubishi Materials U.S.A. Corp., Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsubishi International Corp., Ishikawajima Harima Heavy Industries Co., Ltd., IHI, Inc., Mitsubishi Heavy Industries, Ltd., Mitsubishi Heavy Industries America, Inc., Mitsui Mining Co., Ltd., Mitsui Mining U.S.A., Inc., Nippon Steel Corporation, Nippon Steel U.S.A., Inc., Nippon Steel Trading Co., Ltd., and Nippon Steel Trading America, Inc., as Amici Curiae on behalf of Petitioners.

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INTRODUCTION

Code of Civil Procedure section 354.6[1] allows certain individuals who were "slave labor" or "forced labor" victims during World War II (WWII) to recover compensation for unpaid labor and personal injuries suffered at the hands of "the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

occupied by or under control of the Nazi regime or its allies and sympathizers." (§ 354.6, subd. (a)(1) & (2).) On January 15, 2003, we decided section 354.6 was constitutional because the lawsuits authorized by the statute did not impermissibly infringe upon the federal government's exclusive power over foreign affairs, and because the Treaty of Peace with Japan that formally ended WWII between the United States and Japan (1951 Treaty) did not demonstrate a clear intent to bar the wartime claims of Korean nationals.

The California Supreme Court granted review and transferred this case back to us with instructions to vacate our opinion and reconsider it in light of *American Ins. Ass'n v. Garamendi* (2003) 539 U.S. 396 [123 S.Ct. 2374, 156 L.Ed.2d 376] (*Garamendi*), decided by the United States Supreme Court on June 23, 2003. *Garamendi* held California's Holocaust Victim Insurance Relief Act (HVIRA) was unconstitutional because it conflicted with certain executive agreements negotiated by the President with several European leaders. The executive agreements sought, among other things, to encourage European insurers to provide information about unpaid insurance policies issued to Holocaust victims and the settlement of claims brought under them. (*Id.* at pp. 2381-2383.) The Court held HVIRA's requirement that insurers publicly disclose information concerning Holocaust-era policies conflicted with, and thus was preempted by, the President's foreign policy embodied in the agreements that such information and claims be resolved voluntarily rather than through a state system of economic compulsion. (*Id.* at pp. 2391-2393.)

In light of *Garamendi,* we vacate our prior opinion and hold section 354.6 is unconstitutional because it

conflicts with the federal policy embodied in the 1951 Treaty. While the 1951 Treaty does not expressly preempt Jeong's claims under section 354.6, it embodies the federal government's foreign policy that claims against Japan and its nationals are to be resolved diplomatically. By encouraging coercive litigation of claims against Japanese nationals, section 354.6 conflicts with the federal policy of diplomacy embodied in the treaty.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Jae Won Jeong sued to recover compensation for unpaid labor and personal injuries suffered while enslaved in a labor camp during WWII. Jeong, who is now a United States citizen and a California resident, claims he was a Korean national during WWII. Refusing to join the Japanese military, Jeong was taken to a slave labor camp in Korea operated by a Japanese cement company. Along with other Korean nationals, Jeong was subjected to physical and mental torture and forced to perform hard physical labor without compensation, all to benefit the Japanese war effort.[2]

Onoda Cement Co., Ltd., is the Japanese entity that operated the company where Jeong was forced to work. Jeong sued Onoda, Taiheiyo Cement Corporation (the Japanese entity that succeeded Onoda by merger), and three of Taiheiyo's subsidiaries, all of which are referred to

[2] Jeong alleges he represents a class of plaintiffs in the United States who were forced to perform labor for the defendants between 1929 and 1945. A class has not been certified.

as "Taiheiyo."[3] Jeong alleged causes of action for (1) compensation under section 354.6, (2) unjust enrichment, (3) injuries in tort, including battery, intentional infliction of emotional distress, and unlawful imprisonment, and (4) unfair business practices under Business and Professions Code section 17200 et seq.

Taiheiyo moved for judgment on the pleadings contending, among other grounds, the 1951 Treaty preempted Jeong's claims under section 354.6. In a subsequent motion for judgment on the pleadings, Taiheiyo argued section 354.6 was unconstitutional under *Zschernig v. Miller* (1968) 389 U.S. 429 (*Zschernig*) because it interfered with the federal government's exclusive power over foreign affairs, and it violated due process.[4] The trial court denied both motions.

Taiheiyo filed a petition for writ of mandate challenging the trial court's ruling. We denied the petition, deciding the 1951 Treaty did not preempt Jeong's claims under section 354.6 and the statute was constitutional under *Zschernig's* foreign affairs doctrine. As we will discuss, we have reconsidered this case in light of *Garamendi,* which compels us to conclude section 354.6 is unconstitutional.

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[3] The Taiheiyo subsidiaries are (1) Taiheiyo Cement U.S.A., (2) California Portland Cement Company, and (3) Lone Star Northwest, Inc. Each subsidiary is alleged as a California corporation. Lone Star is now known as Glacier Northwest, Inc., a Washington corporation.

[4] Under *Zschernig's* dormant foreign affairs preemption doctrine, "state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict." (*Garamendi, supra,* 123 S.Ct. at p. 2388.)

DISCUSSION

A. Section 354.6 Permits Actions for World War II Claims.

Enacted as an emergency measure in 1999 (S.B. 1245), section 354.6 allows any WWII "slave labor victim" or "forced labor victim," or their heirs, to "bring an action to recover compensation for labor performed as a . . . slave labor victim or . . . forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate." (§ 354.6, subd. (b).)[5] The statute provides that California courts have jurisdiction over such lawsuits and that "[a]ny action brought under this section shall not be

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[5] A WWII "slave labor victim" is defined as "any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§ 354.6, subd. (a)(1).)

A WWII "forced labor victim" is defined as "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§ 354.6, subd. (a)(2).)

"Compensation" means "the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation." (§ 354.6, subd. (a)(3).)

dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010." (§ 354.6, subds. (b) & (c).)

The Legislature clarified that section 354.6 was enacted because "[t]housands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California. ¶ (b) These victims of Nazi persecution have been deprived of their entitlement to compensation for their labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War. ¶ (c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War. ¶ (d) To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any other provision of law prior to the enactment of this act." (S.B. 1245, § 1(a)-(d).)

In short, section 354.6 permits actions for unpaid labor and personal injuries by persons subjected to slave or forced labor during WWII by the Nazis, their allies and sympathizers. It allows victims to sue the entities that enslaved them, or any successor in interest or affiliate of those entities.

B. Garamendi's "Conflict" Theory of Foreign Affairs Preemption.

Because *Garamendi* forms the basis for our conclusion in this case, it is important to describe its salient facts and rationale. HVIRA required insurers doing business in California to disclose details of insurance policies issued by the insurer, or related companies, to persons in Europe between 1920 and 1945. (Ins. Code, §§ 13800-13807.) Those details included the status of each policy, the city of origin, the domicile or address of each policyholder, and the names of beneficiaries. (Ins. Code, § 13804, subd. (b).) If the insurer failed to provide the disclosures, it lost its license to do business in the state. (Ins. Code, § 13806.)

As noted by the statute, the California Legislature said that "[i]n addition to the many atrocities that befell the victims of the Nazi regime, insurance claims that rightfully should have been paid out to the victims and their families, in many cases, were not," and thus the law was "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary." (Ins. Code, § 13801, subds. (b) & (f).) The law also was intended to enhance enforcement of section 354.5, a statute enacted along with HVIRA that allowed lawsuits in California courts on insurance claims based on acts perpetrated during the Holocaust, and extended the statute of limitations on such actions to 2010. (Ins. Code, § 13801, subd. (e); *Garamendi, supra,* 123 S.Ct. at p. 2384.)

The Ninth Circuit concluded HVRIA did not invade the federal government's exclusive role over foreign affairs

(*Gerling Global Reinsurance Corp. of America v. Low* (9th Cir. 2001) 240 F.3d 739, 753), but a majority of the United States Supreme Court, in a 5-4 decision, disagreed (*Garamendi, supra,* 123 S.Ct. at p. 2385). The critical issue before the Court was whether certain executive agreements negotiated by the President of the United States with the leaders of Germany and Austria presented a sufficiently clear expression of federal foreign policy so as to conflict with and therefore preempt the California law. (*Id.* at pp. 2387-2388.) The executive agreements sought, among other things, to encourage European insurers to provide information about unpaid insurance policies issued to Holocaust victims and the settlement of claims brought under them as an alternative to protracted litigation. (*Id.* at pp. 2381-2383.)

The Court reaffirmed the principle that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy" and that "'the President's control of foreign relations includes the settlement of claims. . . .'" (*Garamendi, supra,* 123 S.Ct. at pp. 2386-2387.) The Court further acknowledged that the executive agreements did not include a preemption clause and thus could not expressly preempt the California law. Nonetheless, the Court held the foreign policy embodied in the agreements – disclosure and settlement through diplomacy rather than litigation – was sufficiently in conflict with HVIRA to require its preemption. (*Id.* at pp. 2387-2390.) The Court concluded:

"[T]he consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions. . . . As for insurance claims in particular, the national position, expressed unmistakably in the

executive agreements signed by the President with Germany and Austria, has been to encourage European insurers to work with the ICHEIC [International Commission on Holocaust Era Insurance Claims,]" a voluntary international organization of insurers, "to develop acceptable claim procedures, including procedures governing disclosure of policy information. . . . (Citations omitted.)

"California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail. . . . HVIRA's economic compulsion to make public disclosure, of far more information about far more policies than ICHEIC rules require, employs 'a different, state system of economic pressure,' and in doing so undercuts the President's diplomatic discretion and the choice he has made exercising it. [Citation.] Whereas the President's authority to provide for settling claims in winding up international hostilities requires flexibility in wielding 'the coercive power of the national economy' as a tool of diplomacy, [citation], HVIRA denies this, by making exclusion from a large sector of the American insurance market the automatic sanction for noncompliance with the State's own policies on disclosure. . . .

"The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves. We have heard powerful arguments that the iron fist would work better, and it may be that if the matter of compensation were considered in isolation from all other issues involving the European allies, the iron fist would be the preferable policy. But our thoughts on the efficacy of the one approach versus the other are beside the point, since our business is not to judge the wisdom of the

National Government's policy; dissatisfaction should be addressed to the President or, perhaps, Congress. The question relevant to preemption in this case is conflict, and the evidence here is 'more than sufficient to demonstrate that [HVIRA] stands in the way of [the President's] diplomatic objectives.' [Citation.]" (*Garamendi, supra,* 123 S.Ct. at pp. 2390-2393.)

Thus, under *Garamendi's* "conflict" theory of foreign affairs preemption, the focus is not upon whether the federal law expressly precludes or even mentions the state action involved. The critical inquiry is whether the federal expression of foreign policy conflicts with the state law. Despite the fact the executive agreements did not demonstrate an intent to occupy the field of Holocaust insurance information disclosure and claims, and according to the dissent did not even mention the issue of disclosure (*Garamendi, supra,* 123 S.Ct. at p. 2399 (dis. opn. of Ginsburg, J.)), the Supreme Court found foreign affairs preemption based solely on HVIRA's conflict with the foreign policy embodied in the agreements. The Court said, "The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two." (*Id.* at p. 2390.)

C. The 1951 Treaty Preempts Section 354.6.

Taiheiyo and the United States as amicus curiae contend section 354.6 conflicts with the federal policy embodied in the 1951 Treaty favoring diplomatic resolution of WWII-related claims, including the forced or slave labor claims of Korean nationals against Japanese

corporations, like those alleged by Jeong. In light of *Garamendi,* we agree.

1. The 1951 Treaty Embodies Federal Foreign Policy.

The 1951 Treaty "was signed at San Francisco . . . by the representatives of the United States and 47 other Allied powers and Japan. [Citation.] President Truman, with the advice and consent of the Senate, ratified the treaty and it became effective April 28, 1952. [Citation.] [¶] . . . [T]he salient features of the agreement are: (1) a grant of authority of Allied powers to seize Japanese property within their jurisdiction at the time of the treaty's effective date; (2) an obligation of Japan to assist in the rebuilding of territory occupied by Japanese forces during the war[,] and (3) waiver of all 'other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. . . . ' [Citation.]" (*In re World War II Era Japanese Forced Labor Litigation* (N.D.Cal. 2000) 114 F.Supp.2d 939, 944-945, italics omitted.)

One of the purposes behind the 1951 Treaty was to spare the Japanese economy from heavy reparations and welcome it into the company of Allied nations despite the events that occurred during WWII. (See *Mitsubishi Materials Corp. v. Superior Court* (2003) 113 Cal.App.4th 55, 66-67 (*Mitsubishi*).) Article 14 of the 1951 Treaty, which addressed the subject of Allied claims against Japan, explicitly recognized Japan could not pay for all the damages and suffering it had inflicted: "It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war.

Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations." (1951 Treaty, Sept. 8, 1951, art. 14(a), 3 U.S.T. 3169, 3180, T.I.A.S. No. 2490.) As one court has phrased it, "Without a waiver of all war crime claims that could have been brought by either side, Japan and the United States might have wrangled endlessly about liabilities arising out of the war." (*Mitsubishi, supra,* 113 Cal.App.4th at p. 68.)[6]

As a result, the next paragraph, Article 14(b), expressly waived all Allied claims against Japan and its nationals: "(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation." (1951 Treaty, *supra,* art. 14(b), 3 U.S.T. at p. 3183.) Among the claims waived by this

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[6] Potential Allied claims against Japan amounted to more than $100 billion in 1952 dollars. (Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, Sen.Exec.Rep. No. 2, 82d Cong., 2d Sess. (1952) p. 13.) According to the U.S. Senate Foreign Relations Committee reviewing the 1951 Treaty, "Obviously insistence upon the payment of reparations in any proportion commensurate with the claims of the injured countries and their nationals would wreck Japan's economy, dissipate any credit that it may possess at present, destroy the initiative of its people, and create misery and chaos in which the seeds of discontent and communism would flourish. In short, insistence upon the payment of claims for reparations in any substantial amount would be contrary to the basic purposes and policy of the free nations, the Allied Powers, and the United States in particular." (*Id.* at p. 12.)

provision were those of American prisoners of war (POWs) who were enslaved during WWII and forced to perform uncompensated labor for the Japanese war effort. (See *Mitsubishi, supra,* 113 Cal.App.4th at pp. 70-73.)

Korea was not a signatory to the 1951 Treaty because, as part of the Empire of Japan until the end of WWII, it had not been at war with Japan. (See *In re: World War II Era Japanese Forced Labor Litigation* (N.D.Cal. 2001) 164 F.Supp.2d 1160, 1167-1168.) Thus, Article 14's waiver provision did not specifically apply to Korean claims. Nonetheless, Article 4(a) addresses the handling of such claims: "[T]he disposition of property of Japan and of its nationals . . . and their claims, including debts, against [Korea] . . . , and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. . . . (The term nationals . . . includes juridical persons.)" (1951 Treaty, *supra,* art. 4(a), 3 U.S.T. at p. 3173.)[7] Similarly, with respect to other non-signatory nations, Article 26 provides: "Japan will be prepared to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty." (*Id.* at p. 3190.) In other words, Articles 4(a) and 26 indicated the claims of non-signatory nations were to be negotiated

[7] In return, Article 21 gave Korea the benefits of Articles 2, 4, 9 and 12, which dealt with the recognition of Korean independence, the right of Korean authorities to seize all Japanese-owned assets in Korea, and the right of Korea to obtain certain economic agreements on a most-favored-nation basis, as well as other commercial rights. (1951 Treaty, *supra,* 3 U.S.T. at pp. 3172-3174, 3177-3179.)

separately by the government of Japan with the governments of those nations.

In our original opinion in this case, we concluded the 1951 Treaty did not preempt section 354.6 because Articles 4(a) and 26 did not evidence a sufficiently clear intent to foreclose claims by individuals of non-signatory nations against Japanese nationals, like those alleged by Jeong against Taiheiyo. Our view was similar to the one expressed by Justice Ginsburg in *Garamendi* on behalf of the dissenting justices. Justice Ginsburg, along with Justices Stevens, Scalia and Thomas, would have upheld HVIRA because the President's executive agreements did not contain a formal expression of foreign policy disapproving state disclosure laws like HVIRA and did not expressly extinguish any underlying claims for relief. (*Garamendi, supra,* 123 S.Ct. at pp. 2395-2401 (dis. opn. of Ginsburg, J.).) For the majority of the Court, however, it was sufficient for preemption purposes that the executive agreements embodied the federal purpose and foreign policy of dealing with Holocaust insurance claims through diplomacy, and that this foreign policy conflicted with HVIRA's "regulatory sanctions to compel disclosure and payment." (*Id.* at pp. 2390-2392.)

We must therefore agree with Taiheiyo and the United States that similar to the executive agreements in *Garamendi,* Articles 4(a) and 26 embody the federal purpose and foreign policy that WWII claims by individuals of non-signatory nations were to be resolved through diplomacy. Article 4(a) expresses the federal policy that claims by Korean nationals against Japanese nationals were to be "the subject of special arrangements" between the Korean and Japanese governments. While neither Japan nor Korea was required to implement any specific resolution,

and Korea was under no obligation to even negotiate with Japan concerning the settlement of war claims, the treaty nonetheless expressed the foreign policy determination of the Allied Powers, including the United States, that such claims should be resolved diplomatically between the Japanese and Korean governments.[8]

Indeed, *Garamendi's* conclusion that the President's agreements embodied his foreign policy is far more compelling in this case. After all, rather than unilateral presidential agreements, we are dealing with federal policy expressed through a ratified treaty, the ultimate formal expression of the federal executive and legislative branches in matters of foreign policy. (See U.S. Const., art. VI [treaties made "under the Authority of the United States, shall be the supreme Law of the Land," thus overriding any conflicting state law]; see *Mitsubishi, supra,* 113 Cal.App.4th at pp. 61 & 75-76; *Missouri v.*

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[8] In June 1965, pursuant to Article 4(a), Japan and South Korea did indeed enter into an agreement concerning war claims. (See Agreement on the Settlement of Problems Concerning Property and Claims and on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, 8473 U.N.T.S. 258, 260.) Likewise, China entered into war claims agreements with Japan in 1952 and 1978. (See Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3, 38; Treaty of Peace and Friendship Between Japan and the People's Republic of China, Aug. 12, 1978, 1225 U.N.T.S. 257, 269.) As to North Korea, the negotiations contemplated by Article 4(a) remain unresolved and are ongoing. In expressing its views to the United States regarding the effect of section 354.6, the government of Japan indicated in November 2000 that it has "conducted normalization talks with North Korea eight times from 1991 to 1992 and already three times after the resumption of the negotiations in April 2000." (Embassy of Japan, letter to U.S. Dept. of State (Nov. 17, 2000), The Views of the Government of Japan on the Lawsuits against Japanese Companies by the Nationals of the Countries not being a Party to the San Francisco Peace Treaty.)

Holland (1920) 252 U.S. 416, 432; *United States v. Belmont* (1937) 301 U.S. 324; *Zicherman v. Korean Air Lines Co.* (1996) 516 U.S. 217, 226.)

Recently, one federal court also concluded the 1951 Treaty expressed the federal government's foreign policy regarding the diplomatic resolution of claims by individuals of non-signatory nations. In rejecting damage claims by WWII "comfort women" against the government of Japan, the D.C. Circuit stated:

"[T]he 1951 Treaty . . . between Japan and the Allied Powers created a settled expectation on the part of Japan that it would not be sued in the courts of the United States for actions it took during the prosecution of [WWII], and the Congress has done nothing . . . to upset that expectation. . . .

" . . . [T]he Treaty 'embodies the foreign policy determination of the United States that all claims against Japan arising out of its prosecution of [WWII] are to be resolved through intergovernmental settlements.' . . .

" . . . The Treaty further provides that Japan would resolve the war-related claims of other United Nations member states and their nationals 'on the same or substantially the same terms,' that is, through intergovernmental agreements. . . . As a result, Japan could not have expected to be sued in a court of the Unites [sic] States by either an Allied national or a Chinese or Korean national for a claim arising out of [WWII] because the Allied Powers had respectively waived the claims of their nationals and expressed a clear policy resolving the claims of other nationals through government-to-government negotiation. As a matter of foreign policy it would be odd indeed for the United States, on the one hand, to waive all claims of its

nationals against Japan and, on the other hand, to allow non-nationals to proceed against Japan in its courts." (*Hwang Geum Joo v. Japan* (D.C. Cir. 2003) 332 F.3d 679, 681, 684-685.)

2. The 1951 Treaty Conflicts with Section 354.6.

We must further agree with Taiheiyo and the United States that the 1951 Treaty's expression of foreign policy sufficiently conflicts with section 354.6 so as to require its preemption. In our original opinion, we concluded section 354.6 did not create a new cause of action but was a proper procedural statute intended to retroactively extend the applicable statute of limitations for pre-existing WWII slave and forced labor claims. At least two appellate courts have, in contrast, determined section 354.6 is not procedural, but creates new claims that otherwise would not exist. (See *Mitsubishi, supra,* 113 Cal.App.4th at p. 59; *Deutsch v. Turner Corp.* (9th Cir. 2003) 324 F.3d 692, 707 (*Deutsch*), cert. den. (2003) 124 S.Ct. 105.)[9] But whether viewed as procedural or substantive, it is inescapable that

[9] *Deutsch,* decided six days after we issued our original opinion in this case, concluded section 354.6 was unconstitutional "because it intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." (324 F.3d at p. 712.) The court focused on the fact the United States had already exercised its own exclusive authority to resolve the war, including claims arising out of it, and chose not to incorporate into that resolution a private right of action against our wartime enemies or their nationals. (*Id.* at pp. 712-713.) The court said, "Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action – or, alternatively, to resurrect time-barred claims – in order to provide its own remedy for war-related injuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional." (*Id.* at p. 716.)

section 354.6 is a special rule authorizing WWII slave and forced labor victims to sue and recover damages in California courts as a result of their enslavement during the war, a rule that conflicts with the 1951 Treaty's expression of federal policy that such war-related claims should be resolved diplomatically.

Just as the executive agreements in *Garamendi* established the federal executive's foreign policy of voluntary disclosure and payment "in preference to litigation or coercive sanctions" (*Garamendi, supra,* 123 S.Ct. at p. 2390), Article 4(a) expresses the federal government's foreign policy determination that claims by Korean nationals, like Jeong's, should be resolved diplomatically by the governments of Korea and Japan. Likewise, just as HVIRA's regulatory sanctions compelling disclosure conflicted with the foreign policy embodied in the President's agreements, section 354.6's "different tack" of providing for the resolution of wartime claims through coercive litigation in California courts conflicts with Article 4(a)'s expression of foreign policy. (See *Id.* at p. 2391.) Under *Garamendi,* the expression of federal policy embodied in the 1951 Treaty and the conflict raised by section 354.6 "are alone enough to require state law to yield." (*Id.* at p. 2392.)

It does not matter that Jeong's claims are against private Japanese corporations rather than against the government of Japan. *Garamendi* made clear that "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." (*Garamendi, supra,* 123 S.Ct. at p. 2390.) The United States' policy that Korean claims

should be resolved diplomatically included the claims of Korean nationals against Japanese "juridicial persons," i.e., corporations. (1951 Treaty, *supra,* art. 4(a), 3 U.S.T. at p. 3173.) Section 354.6 authorizes lawsuits against such corporations for whom the slave or forced labor was performed. (§ 354.6, subd. (b).) Just as HVIRA's compulsive requirement that private insurance companies disclose insurance policy information conflicted with the federal executive's foreign policy that such disclosure be voluntary, section 354.6's authorization of lawsuits against private Japanese corporations for wartime conduct conflicts with the federal policy embodied in Article 4(a) that claims against such entities should be resolved diplomatically.

Jeong seeks to distinguish *Garamendi* by contending that unlike the executive agreements at issue in that case, which provided compensation to Holocaust victims, there has been no current federal attempt to establish a similar compensation system for WWII victims of the Japanese government. Jeong misreads *Garamendi* and the 1951 Treaty. The executive agreements in *Garamendi* did not necessarily provide compensation to Holocaust victims. Indeed, as the dissent pointed out, the voluntary system encouraged by the President had yielded settlement of "only a tiny proportion of the claims," and the insurers' disclosure of policy information had not been "significant." (*Garamendi, supra,* 123 S.Ct. at p. 2396 (dis. opn. of Ginsburg, J.).) The Court's focus in *Garamendi* was HVIRA's conflict with the President's foreign policy embodied in the agreements encouraging the voluntary disclosure of insurance policy information and the nonadversarial settlement of insurance claims. Just as the effectiveness of the President's foreign policy was irrelevant to

the *Garamendi* majority's conflict determination (*id.* at p. 2393), it is likewise irrelevant whether the government-to-government negotiation contemplated by Article 4(a) will result in satisfactory results.

Jeong further contends section 354.6 merely seeks to extend the statute of limitations for claims asserted in California courts, a state interest present in this case that was lacking in *Garamendi*. The *Garamendi* court rejected a similar claim that HVIRA's disclosure requirement simply protected the legitimate consumer protection interests of California residents. The Court noted the state interest expressed by the statute clearly showed a concern for the thousands of Holocaust survivors living in the state. The Court said, "As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." (*Garamendi, supra,* 123 S.Ct. at p. 2393.)

Similarly in this case, it does not matter if section 354.6 is characterized as a legitimate procedural statute enacted within an area of traditional state competence. As with HVIRA's stated purpose of addressing the insurance claims of Holocaust survivors, which was in conflict with the President's foreign policy, the express reason behind section 354.6 is to assure the "[t]housands of victims of Nazi persecution, and the heirs of victims of Nazi persecution . . . are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." (S.B. 1245, § 1(a) & (b).) This interest, while noble, conflicts with the federal policy embodied in Articles 4(a), 14(b), and 26 of the 1951 Treaty.

3. Section 354.6's Preemption Is Constitutional.

Finally, Jeong argues that preempting his claims under section 354.6 would be unconstitutional because it would result in taking his property rights without just compensation and violate his right to equal protection of the laws. He points to a footnote in *Garamendi* indicating preemption of state law by executive agreements is "[s]ubject . . . to the Constitution's guarantees of individual rights." (*Garamendi, supra,* 123 S.Ct. at p. 2387, fn. 9.) These arguments have no merit because *Garamendi* specifically upheld the federal government's ability to constitutionally resolve wartime claims of private parties by executive agreement.

The Court noted that making executive agreements to settle claims of American nationals against foreign governments is a longstanding practice dating back to President George Washington's settlement of the claims made by American citizens against the Dutch government for loss of cargo to Dutch privateers. (*Garamendi, supra,* 123 S.Ct. at p. 2387.) The Court said it did not matter that the President's agreements regarding Holocaust-era insurance policies addressed claims against corporations rather than foreign governments. The Court noted: "Historically, wartime claims against even nominally private entities have become issues in international diplomacy. . . . Acceptance of this historical practice is supported by a good pragmatic reason for depending on executive agreements to settle claims against foreign corporations associated with wartime experience. As shown by the history of insurance confiscation mentioned earlier, untangling government policy from private initiative during war time is often so hard that diplomatic action settling claims against private parties may well be just as essential in the

aftermath of hostilities as diplomacy to settle claims against foreign governments. . . . " (*Id.* at p. 2387.) Thus, "resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs." (*Id.* at p. 2390.)

A division of the Fourth Appellate District recently rejected similar constitutional arguments. In response to arguments by American POW plaintiffs that preemption of their section 354.6 claims by the 1951 Treaty would result in an unconstitutional taking of their right to sue, the court recognized the United States Constitution is clear that only the federal government has the power to make war and peace with foreign nations, and that power specifically includes the authority to make peace treaties. (*Mitsubishi, supra,* 113 Cal.App.4th at p. 77.) This power necessarily implies the ability to constitutionally foreclose litigation of war-related claims: "It is therefore inescapable that the claims of American nationals arising out of duly declared war against foreign nationals as part of the prosecution of that war may be constitutionally compromised in a peace treaty. . . . If the United States government did not have the constitutional power to resolve claims *arising out of war* by American citizens against foreign nationals, then it would not have the power to conclude a genuine peace treaty." (*Id.* at p. 78, original italics.)

The court recognized, as we do in this case, that *Garamendi's* conclusion regarding the federal government's ability to constitutionally resolve wartime claims of private parties by executive agreement is even more compelling where a treaty expresses a federal policy regarding those claims: "If, in *Garamendi,* the high court

would see no constitutional impediment to the *federal executive's* efforts to compromise property claims of civilian Holocaust victims, then a fortiori there can be no constitutional impediment where a *treaty* (not just the unilateral efforts of one administration) compromises claims of American combatants for actions taken against those combatants as prisoners of war by a foreign government and its nationals during time of war as part of the foreign government's overall war effort." (*Mitsubishi, supra,* 113 Cal.App.4th at p. 79, original italics.)

The fact that Jeong was a Korean national when his war claims arose does not diminish the federal government's constitutional power to declare, as a matter of United States foreign policy, how his claims should be resolved, as it has done in the 1951 Treaty. The insurance claims addressed by the President's agreements in *Garamendi* were indeed asserted by Americans against foreign companies. But, just like Jeong, those Holocaust victims were foreigners at the time their claims arose. Just as the Supreme Court perceived no constitutional impediment to the resolution of those claims by executive agreement, we see none where the federal determination has been made by treaty. (See *Deutsch, supra,* 324 F.3d at p. 714, fn. 14 ["When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress"].)

D. Conclusion.

Under *Garamendi's* "conflict" theory of foreign affairs preemption, state law is preempted where that law

conflicts with the foreign affairs policy embodied in presidential agreements with foreign leaders. The 1951 Treaty embodies the determination of the United States that claims of non-signatory nations like Korea, and their nationals, were to be resolved with Japan by government-to-government negotiations. In contrast, by enacting section 354.6, the California Legislature has allowed those claims to be litigated in our courts. *Garamendi* compels our conclusion that by allowing WWII slave or forced labor victims to be resolved in court, California's law conflicts with the foreign policy expressed in the 1951 Treaty. As a result, we hold the treaty preempts section 354.6.[10]

DISPOSITION

The petition for writ of mandate is granted. The trial court is ordered to vacate its order denying the motion for judgment on the pleadings and enter a new order granting the motion and dismissing the action. The order to show cause, having served its purpose, is discharged. Our previous order staying trial court proceedings is dissolved.

In the interests of justice, each side will bear its own costs.

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[10] As we have noted, in addition to his action under section 354.6, Jeong also asserted causes of action for unjust enrichment, injuries in tort, including battery, intentional infliction of emotional distress, and unlawful imprisonment, as well as unfair business practices under Business and Professions Code section 17200 et seq. These causes of action have, of course, long expired. (See *Mitsubishi, supra,* 113 Cal.App.4th at p. 59.) Because we hold the 1951 Treaty preempts section 354.6, Jeong's remaining causes of action are time-barred.

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BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.

RUBIN, J., Concurring.

> *"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311, dis. opn. of Brandeis, J., italics added.)

I join in the majority opinion which I have signed and which I believe is compelled by the United States Supreme Court opinion in *American Ins. Ass'n v. Garamendi* (2003) 539 U.S. 396 [123 S.Ct. 2374, 156 L.Ed.2d 376] (*Garamendi*). As an intermediate appellate court we are obligated to follow United States Supreme Court precedent in matters involving federal constitutional law. (See *Chesapeake & Ohio Ry. v. Martin* (1931) 283 U.S. 209, 220-221, 51 S.Ct. 453, 458; *Perkins Mfg. Co. v. Jordan* (1927) 200 Cal. 667, 678; *People v. Superior Court (Moore)* (1996) 50 Cal.App.4th 1202, 1211.)

I write separately only to note the consequences of applying implied preemption in this setting. Certainly, the federal government in making executive agreements or treaties can expressly preempt state statutes that intrude

in an area that the federal government considers sacrosanct. All that is required is an affirmative declaration by Congress that federal law prohibits state regulation. (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 738, 105 S.Ct. 2380 (*Metropolitan*); *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516-518, 112 S.Ct. 2608; see also *Tafflin v. Levitt* (1990) 493 U.S. 455, 458-459, 110 S.Ct. 792 [it is presumed Congress ordinarily does not intend to displace existing state authority].) In those instances, the supremacy clause mandates that state interests must yield to paramount federal concerns. *Garamendi* and our majority opinion, however, are founded on a form of implied preemption also authorized as a matter of federal constitutional principle. (*Metropolitan, supra,* 471 U.S. at p. 738.) In the former, the court concluded that federal policy is to resolve Holocaust claims through diplomacy. In the latter, we state implied federal policy dictates that claims of Korean nationals against Japan are also to be resolved through diplomatic channels.

In some respects the present case is a stronger one for federal preemption. As the majority points out, *Garamendi* deals with unilateral presidential agreements. The present matter deals with a ratified treaty, "the ultimate formal expression of the federal executive and legislative branches in matters of foreign policy." (Maj. opn., *ante,* p. 15.) Nevertheless, applying implied preemption here dramatically tips the balance between state and federal power in favor of the latter when, by definition, the federal government has not spoken expressly on the subject. The United States Supreme Court has addressed state powers vis-á-vis the federal government on a number of occasions in recent years. (See, e.g., *Federal Maritime Comm'n v. South Carolina Ports Authority* (2002) 535 U.S. 743, 122

S.Ct. 1864.) We have been reminded that "'[t]he "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties."'" (*Id.* at p. 769, 122 S.Ct. at p. 1879.) By guarding against encroachments by the federal government on matters preserved for the states, "we strive to maintain the balance of power embodied in our Constitution" and to "'reduce the risk of tyranny and abuse from either front.'" (*Ibid.*; see also *Gregory v. Ashcroft* (1991) 501 U.S. 452, 458, 111 S.Ct. 2395.)

Here, the 1951 Treaty is silent on claims involving Korean nationals. Code of Civil Procedure section 354.6, the California statute in question, essentially extends the statute of limitations for certain common law claims that would otherwise be time barred. The enactment of statute of limitations has been historically a matter left to the wide discretion of each state. (See *Sun Oil Co. v. Wortman* (1988) 486 U.S. 717, 722, 108 S.Ct. 2117.) Given the lack of express preemption in an area traditionally reserved for the states, the doctrine of implied preemption should be used sparingly. This is especially so since the federal government may easily negate state power by simply stating its intent to do so in the applicable legislation, agreement or treaty. Under these circumstances, Justice Ginsberg's words in her dissent in *Garamendi* are particularly convincing: "Although the federal approach differs from California's, no executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA. Absent a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs, I would leave

intact California's enactment." (*Garamendi, supra,* 123 S.Ct. at p. 2395.) Even though from this vantage point it is difficult to see that preemption is "implicitly contained in [the 1981 Treaty's] structure and purpose" (*Metropolitan, supra,* 471 U.S. at p. 738), I agree with the majority that, since Justice Ginsberg's words are found in her dissent, we must vacate the trial court's order under *Garamendi*'s compulsion.

RUBIN, J.

PROOF OF SERVICE.

I certify that true and correct copies of the foregoing PETITION FOR REVIEW were served this 7th day of May, 2004, on the persons listed below by placing the document(s) in a sealed envelope for deposit in the United States Postal Service through the regular mail collection process at the law offices of Fleishman & Fisher, 1875 Century Park East, Suite 2130, Los Angeles, California 90067, in sealed envelopes, with first-class postage fully prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 7, 2004, at Los Angeles, California.

/s/ Robert Reed
Robert Reed

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TAIHEIYO CEMENT CORPORATION et al., Petitioners, v. THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent. --- JAE WON JEONG, Real Party in Interest.	B155736 (Super. Ct. No. BC217805)

(Filed Jan. 15, 2003)

ORIGINAL PROCEEDING in mandate. Peter D. Lichtman, Judge. Petition denied.

Bingham Dana, Matthew E. Digby, Heidi A. Leider; Bingham McCutchen, Matthew E. Digby, Heidi A. Leider; Masuda & Ejiri and Junji Masuda; Loeb & Loeb, Douglas E. Mirell, Joseph Geisman; Greines, Martin, Stein & Richland, Martin Stein, Robin Meadow and Laura Boudreau for Petitioners Taiheiyo Cement Corporation, Taiheiyo Cement U.S.A., Inc., California Portland Cement Company and Glacier Northwest, Inc.

O'Melveny & Myers and John F. Niblock; McCutchen, Doyle, Brown & Enersen and David M. Balabanian; Morrison & Foerster, Lloyd Aubry and Arne D. Wagner; Pillsbury Winthrop and Barbara Croutch; Bingham Dana and Matthew Digby; Bingham McCutchen and Matthew Digby; Sullivan & Cromwell and Robert A. Sacks for Mitsubishi Materials Corp., Mitsubishi Materials U.S.A. Corp., Mitsui & Co., Ltd., Mitsui & Co. (U.S.A.), Inc., Mitsubishi International Corp., Ishikawajima Harima Heavy Industries Co., Ltd., IHI, Inc., Mitsubishi Heavy Industries. Ltd., Mitsubishi Heavy Industries America, Inc., Mitsui Mining Co., Ltd., Mitsui Mining U.S.A., Inc., Nippon Steel Corporation, Nippon Steel U.S.A., Inc., Nippon Steel Trading Co., Ltd., and Nippon Steel Trading America, Inc., as Amici Curiae on behalf of Petitioners.

John S. Gordon, United States Attorney; Robert D. McCallum, Jr., Assistant Attorney General; James G. Hergen and Lara A. Ballard, United States Department of State; Mark Stern, Douglas Hallward-Driemeier and Kathleen Kane, United States Department of Justice, for the United States of America as Amicus Curiae on behalf of Petitioners.

Fleishman & Fisher, Barry A. Fisher, David Grosz; Lieff, Cabraser, Heimann & Bernstein, Elizabeth J. Cabraser, Morris A. Ratner, Bill Lann Lee, Scott P. Nealy; Blumenthal & Markham and David R. Markham; Law Offices of Haewon Shin and Haewon Shin; Cohen, Milstein, Hausfeld & Toll, Michael D. Hausfeld, Agnieszka M. Fryszman; Kenneth T. Haan & Associates and Kenneth T. Haan; Lim, Ruger & Kim, Christopher Kim and Lisa J. Yang for Real Party in Interest Jae Won Jeong.

Strumwasser & Woocher and Fredric D. Woocher; Jack Goldsmith and Erwin Chemerinsky for the Chinese American Citizens Alliance, the Korean-American Federation of Los Angeles, the Korean American Coalition, and the Korean American Chamber of Commerce of Los Angeles as Amici Curiae on behalf of Real Party in Interest.

Schonbrun, DeSimone, Seplow, Harris & Hoffman and Paul L. Hoffman for the Honorable John L. Burton, Herbert J. Wesson, Jr., Tom Hayden, Adam B. Schiff, Gil Cedillo, Wilma Chan, Dr. Judy Chu, Mike Honda, Carol Liu, and George Nakano, as Amici Curiae on behalf of Real Party in Interest.

Bill Lockyer, Attorney General for the State of California, Richard M. Frank, Chief Assistant Attorney General, Louis Verdugo, Jr., Senior Assistant Attorney General, Catherine Z. Ysrael, Supervising Deputy Attorney General, and Phyllis Cheng, Deputy Attorney General, for Attorney General Bill Lockyer as Amicus Curiae on behalf of Real Party in Interest.

INTRODUCTION

Code of Civil Procedure section 354.6[1] allows certain individuals who were "slave labor" or "forced labor" victims during World War II (WWII) to recover compensation for unpaid labor and personal injuries suffered during that time period. In this case, we decide whether an international treaty preempts section 354.6 and whether the

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise indicated.

statute is unconstitutional because it impermissibly infringes upon the federal government's exclusive power over foreign affairs. We also decide whether section 354.6 is unconstitutional because it violates due process by allowing claims that arose long ago outside California. We hold the statute is neither preempted nor unconstitutional. Rather, it validly extends the applicable statute of limitations that would otherwise bar claims for unpaid labor and personal injuries suffered by slave or forced labor victims.

FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Jae Won Jeong sued to recover compensation for unpaid labor and personal injuries suffered while enslaved in a labor camp during WWII. Jeong, who is now a United States citizen and California resident, claims he was a Korean national during WWII. Refusing to join the Japanese military, Jeong was taken to a slave labor camp in Korea operated by a Japanese cement company. Along with other Korean nationals, Jeong was subjected to physical and mental torture and forced to perform hard physical labor without compensation, all to benefit the Japanese war effort.[2]

Onoda Cement Co., Ltd. is the Japanese entity that operated the company where Jeong was forced to work. Jeong sued Onoda, Taiheiyo Cement Corporation (the Japanese entity that succeeded Onoda by merger), and

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[2] Jeong alleges he represents a class of plaintiffs in the United States who were forced to perform labor for the defendants between 1929 and 1945. A class has yet to be certified.

three of Taiheiyo's subsidiaries, all of which are referred to as "Taiheiyo."[3] Jeong alleged causes of action for (1) compensation under section 354.6, (2) unjust enrichment, (3) injuries in tort, including battery, intentional infliction of emotional distress, and unlawful imprisonment, and (4) unfair business practices under Business and Professions Code section 17200 et seq.

Taiheiyo moved for judgment on the pleadings contending, among other grounds, that Jeong's claims were barred by the 1951 Treaty of Peace with Japan (1951 Treaty) and the 1965 Agreement between Japan and Korea. The trial court denied the motion, concluding (1) the 1951 Treaty did not apply to Korean nationals like Jeong because Korea was not a signatory to the treaty, (2) the 1965 Agreement between Japan and Korea did not preempt state law or bar Jeong's claims, and (3) no other federal law expressly or impliedly preempted section 354.6.

After the trial court denied Taiheiyo's motion, a federal district court decided a similar case brought under section 354.6 and concluded the statute was unconstitutional under the foreign affairs doctrine announced by the United States Supreme Court in *Zschernig v. Miller* (1968) 389 U.S. 429 (*Zschernig*). The district court ruled section 354.6 interfered with the federal government's exclusive power over foreign affairs and was unconstitutional. (See *In re: World War II Era Japanese Forced Labor* (N.D. Cal.

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[3] The Taiheiyo subsidiaries are (1) Taiheiyo Cement U.S.A., (2) California Portland Cement Company, and (3) Lone Star Northwest, Inc. Each subsidiary is alleged as a California corporation. Lone Star is now known as Glacier Northwest, Inc., a Washington corporation.

2001) 164 F.Supp.2d 1160, 1173 (*Forced Labor Litigation*).) As a result of the district court's decision, Taiheiyo filed a second motion for judgment on the pleadings asserting the same constitutional argument. In addition, Taiheiyo argued section 354.6 violated due process by reaching claims that arose in a foreign country over 50 years ago.

The trial court again denied Taiheiyo's motion. It disagreed with the federal court's application of *Zschernig* and concluded section 354.6 had no direct impact on foreign relations. The trial court also ruled section 354.6 did not violate due process, but rather legitimately extended statute of limitations that would otherwise bar claims by slave or forced labor victims. This petition followed.

BASIS FOR WRIT REVIEW

In most cases, a review of rulings on pleadings is restricted to an appeal from a final judgment unless circumstances are "of such grave nature or of such significant legal impact that [the court is] compelled to intervene through the issuance of an extraordinary writ." (*Babb v. Superior Court* (1971) 3 Cal.3d 841, 851.)

We agreed to review this case at the pleading stage because the constitutionality of section 354.6 represents a legal issue of widespread interest and significant legal importance. (See *Branch v. Superior Court* (1985) 37 Cal.3d 813, 816; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1269-1270.) In addition, because numerous cases asserting claims under section 354.6 are currently pending in the superior court and no California appellate court has yet ruled on the validity of

this statute, we concluded writ review was warranted and authorized numerous amici curiae to present briefs in support of and in opposition to the petition.

Because this case involves pure questions of law, we are not bound by the trial court's decision. We therefore review it de novo, mindful that Jeong's factual allegations are assumed true. (*People v. Kennedy* (2001) 91 Cal.App.4th 288, 292; *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187.)

DISCUSSION

A. Section 354.6 and Taiheiyo's Contentions

The California Legislature enacted section 354.6 in 1999 as an emergency measure to extend the statute of limitations for a defined class of claims relating to forced or slave labor performed prior to and during WWII. (S.B. 1245.) The statute allows any WWII "slave labor victim" or "forced labor victim," or their heirs, to "bring an action to recover compensation for labor performed as a . . . slave labor victim or . . . forced labor victim from any entity or successor in interest thereof, for whom that labor was performed. . . . " (§354.6, subd. (b).) The statute provides that California courts have jurisdiction over such actions. (*Ibid.*)[4] Section 354.6 was enacted because "California has

[4] A WWII "slave labor victim" is defined as "any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§354.6, subd. (a)(1).)

(Continued on following page)

a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." (S.B. 1245, §1(c).)

Section 354.6, subdivision (c), provides that "[a]ny action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010." In declaring its specific intent, the Legislature added, "To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of

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A WWII "forced labor victim" is defined as "any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." (§354.6, subd. (a)(2).)

"Compensation" means "the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. . . . " (§354.6, subd. (a)(3).)

Other portions of the statute allow slave or forced labor victims to sue the entity or successor in interest for whom labor was performed "either directly or through a subsidiary or affiliate" and authorize interest on "the value of services at the time they were performed, compounded annually to date of full payment without diminution for wartime or postwar currency devaluation." (§354.6, subds. (a)(3) & (b).) The parties make only passing reference to these provisions in their written submissions to this court. Consequently, we do not address them.

limitations under any other provision of law prior to the enactment of this act." (S.B. 1245, §1(d).)

Taiheiyo and amici curiae in support of the petition make four basic contentions concerning the invalidity of section 354.6. First, the 1951 Treaty either expressly or impliedly preempts section 354.6 because it demonstrates the policy of the federal government concerning WWII claims of Korean nationals like Jeong. Second, section 354.6 is unconstitutional under *Zschernig* because it usurps the federal government's exclusive power over foreign affairs. Third, section 354.6 violates due process by allowing claims that arose a half-century ago outside California: And fourth, Jeong's claims present nonjusticiable political questions. As we will explain, we reject these arguments.

B. Preemption and the 1951 Treaty

1. Express Preemption

Express preemption, as the term suggests, requires an affirmative declaration by Congress that federal law prohibits state regulation. (*Metropolitan Life Ins. Co. v. Massachusetts* (1985) 471 U.S. 724, 738; *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516-518; see also *Tafflin v. Levitt* (1990) 493 U.S. 455, 466 [it is presumed Congress ordinarily does not intend to displace existing state authority].)

The U.S. Constitution mandates that treaties made "under the Authority of the United States, shall be the supreme Law of the Land," thus overriding any conflicting state law. (U.S. Const., art. VI; see *Missouri v. Holland* (1920) 252 U.S. 416, 432; *United States v. Belmont* (1937)

301 U.S. 324, *Zicherman v. Korean Air Lines Co.* (1996) 516 U.S. 217, 226.) In determining whether a treaty overrides state law, "it is our responsibility to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." (*Air France v. Saks* (1985) 470 U.S. 392, 399.)

The 1951 Treaty "was signed at San Francisco . . . by the representatives of the United States and 47 other Allied powers and Japan. [Citation]. President Truman, with the advice and consent of the Senate, ratified the treaty and it became effective April 28, 1952. [Citation.] . . . [¶] [T]he salient features of the agreement are: (1) a grant of authority of Allied powers to seize Japanese property within their jurisdiction at the time of the treaty's effective date; (2) an obligation of Japan to assist in the rebuilding of territory occupied by Japanese forces during the war[,] and (3) waiver of all 'other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war. . . . ' [Citation.]" (*In re World War II Era Japanese Forced Labor* (N.D.Cal. 2000) 114 F.Supp.2d 939, 944-945.) Neither Korea nor China were signatories to the 1951 Treaty. (*Forced Labor Litigation, supra*, 164 F. Supp.2d at pp. 1167-1168.)

Taiheiyo and the United States as amicus curiae argue the waiver provision of Article 14(b) of the 1951 Treaty expressly preempts Korean nationals like Jeong from asserting claims under section 354.6. The provision reads: "(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the

war, and claims of the Allied Powers for direct military costs of occupation." (Treaty of Peace With Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3183, T.I.A.S. No. 2490.)

Nothing in this or any other provision of the 1951 Treaty expressly preempts or bars claims by Korean nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WWII. To the contrary, the treaty recognized the waiver provision of Article 14 was to have no effect on the claims of non-signatory nations.

The 1951 Treaty did not address claims between Korean and Japanese nationals because the Allied Powers had no authority to bind Korea, which was not a signatory nation to the Treaty. The 1951 Treaty, however, provides that claims between Korean and Japanese nationals were to be the subject of separate arrangements between the two countries. Specifically, Article 4(a), which addressed Japan's post-war relationship with Korea, provides that "the disposition of property of Japan and of its nationals . . . and their claims, including debts, against [Korea] . . . , and the disposition in Japan of property of [Korean] authorities and residents, and of claims, including debts, of [Korean] authorities and residents against Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities." (1951 Treaty, *supra*, 3 U.S.T. at p. 3173.)

Korea benefited from Article 4(a)'s requirement that Japan enter into future negotiations concerning the resolution of war claims.[5] However, neither Japan nor

[5] In June 1965, Japan and the Republic of Korea entered into an agreement concerning war claims. (See Agreement on the Settlement of

(Continued on following page)

Korea was required to implement any specific resolution. Indeed, Korea was under no obligation to even negotiate with Japan concerning the settlement of war claims. Further, another treaty provision required Japan, as part of any future arrangements with non-signatory nations, to provide them "the same or substantially the same terms" as to the signatory nations. However, even that obligation, binding only on Japan, expired after three years.[6]

In sum, the 1951 Treaty did not bar future claims by individuals of non-signatory nations and does not expressly preempt section 354.6. We therefore agree with the conclusions of *Forced Labor Litigation* that Article 4(a) "suggest[s] that the treaty contemplates resolution of war claims with Korea . . . through agreements separate and distinct from the [1951 Treaty] and separate agreements necessarily create the possibility that the terms for resolving those claims may differ from the terms of the treaty entered into by the Allied nations. The fact that the signatory nations encouraged such agreements does not show an intent to occupy the field of non-signatory nations'

Problems Concerning Property and Claims and on the Economic Cooperation Between Japan and the Republic of Korea, June 22, 2965, 8473 U.N.T.S. 258.) Taiheiyo does not contend in its petition that the 1965 Treaty expressly preempts Jeong's claims under section 354.6. Rather, Taiheiyo and the United States contend the treaty, as incorporated by reference into the 1951 Treaty, demonstrated the U.S. Congress' overall purpose and intent to preempt the field of war-related claims. We address this implied preemption argument below.

[6] Article 26 provides, in relevant part: "Japan will be prepared to conclude with any State . . . which is not a signatory to the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty." (1951 Treaty, *supra*, 3 U.S.T. at p. 3190.)

claims through the treaty. . . . Whether the agreements subsequently entered by Japan with Korea . . . eliminated the claims of [this] non-signatory nation[] does not bear on whether the [1951 Treaty] preempts claims of . . . Korean nationals. The court reads the language of article[] 4(a) . . . to suggest only that the signatory nations, including the federal government of the United States, did not intend the [1951 Treaty] to control claims of individuals from non-signatory nations." (*Forced Labor Litigation, supra*, 164 F.Supp.2d at pp. 1167-1168.)[7]

2. Implied Preemption

Taiheiyo and the United States further argue that even if the 1951 Treaty does not expressly preempt section 354.6, it is implicitly preempted because the treaty establishes federal policy with respect to the war-related claims of Korean nationals. This contention likewise is without merit.

Federal law "implicitly overrides state law either when the scope of a statute indicates that Congress

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[7] Not only do Articles 4(a) and 14(b) demonstrate an intent that the treaty did not bind non-signatory nations such as Korea and China, but the waiver provisions are not as broad as Taiheiyo and amici curiae contend. Article 14(b) waives claims arising out of actions "taken in the course of the prosecution of the war." As one commentator suggests, it is reasonable to interpret this clause to exclude actions taken by private Japanese companies for profit as not being actions taken in the "course of the prosecution of the war." (See Bazyler, *The Holocaust Restitution Movement in Comparative Perspective* (2002) 20 Berkeley J. Int'l Law, 21-22 [citing *Kawakita v. United States* (1952) 343 U.S. 717, 727-728, where the Supreme Court concluded Japanese companies doing business during the war should be viewed as nothing more than private, profit-making ventures].)

intended federal law to occupy a field exclusively [citation] or when state law is in actual conflict with federal law." (*Freightliner Corp. v. Myrick* (1995) 514 U.S. 280, 287.) The Supreme Court has found implied pre-emption "where it is 'impossible for a private party to comply with both state and federal requirements' [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" (*Ibid.*) "Pre-emption of a whole field . . . will be inferred where the field is one in which 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" (*Hillsborough County v. Automated Medical Labs.* (1985) 471 U.S. 707, 713; see also *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 507.)

Nothing in Article 14(b) or any other provision of the 1951 Treaty signals the United States' intent to occupy the entire field of claims of non-signatory nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WWII. The United States' waiver of claims by its nationals in Article 14(b) applies only to persons who were nationals of the United States at the time. (See *Dames & Moore v. Regan* (1981) 453 U.S. 654, 679-680; *Haven v. Polska* (7th Cir. 2000) 215 F.3d 727, 734.) The United States had no power to waive the claims of nationals from foreign countries and made no provision, either in the 1951 Treaty or in subsequent federal law, to prevent claims from future United States citizens who were nationals of non-signatory nations at the time of the 1951 Treaty.

The fact that the 1951 Treaty called upon Japan to enter into future negotiations with Korea does not evidence an intent to foreclose claims by individuals of non-signatory

nations against Japanese nationals, either in United States courts or elsewhere. Other than encouraging Japan to enter into negotiations with Korea, the Allied Powers, including the United States, had no power or control over the outcome of such negotiations. The Allied Powers must have understood the possibility that the negotiations could fail to produce an agreement between the two countries concerning war claims, and that Korean nationals would be compelled to assert their own individual claims against Japanese nationals.

As a United States citizen, Jeong has a constitutional right of access to the courts of this state in an attempt to redress his individual grievances. (See *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647-648; *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338-339.) That fundamental right of citizenship may not be foreclosed upon a claim of implied preemption unless the language of the 1951 Treaty indicates a clear intent to exclusively occupy the field of Korean claims arising out of WWII. Such clarity is lacking in this case. The 1951 Treaty did not address claims by Korean nationals against Japanese entities conducting business in the United States for unpaid labor and personal injuries suffered during WWII. Nothing in the 1951 Treaty evidences an intent to occupy the field of claims by Korean nationals against Japanese nationals. In short, the fact that section 354.6 allows pre-existing claims to proceed in California courts by retroactively extending the applicable statute of limitations does not implicate the 1951 Treaty.

As the court in *Forced Labor Litigation* commented, "[A]lthough from a perspective of 2001 it may seem anomalous for the United States to negotiate a treaty that bars the claims of its own nationals without a provision

that forecloses resort to a judicial forum in the United States by nationals of non-signatory nations, Article 14(b) contains no express limitation against claims of non-signatory nationals. Little should be read into this omission, which most likely can be explained by the inconceivability a half century ago of such claims by non-signatory nationals being pursued in United States courts." (*Forced Labor Litigation, supra*, 164 F.Supp.2d at p. 1167.) We hold the 1951 Treaty does not implicitly preempt section 354.6.

C. Section 354.6 and the *Zschernig* Doctrine

Taiheiyo and amicus curiae next argue that, even without consideration of the 1951 Treaty, section 354.6 is unconstitutional in its application because it impermissibly intrudes on the exclusive foreign affairs power of the United States as expressed in *Zschernig*. We disagree.

1. The *Zschernig* Doctrine

Zschernig articulated the "dormant foreign relations preemption" doctrine, which holds the federal government has exclusive power in the field of foreign relations even in the absence of any federal law or treaty. (*Gerling Global Reinsurance Corp. of America v. Low* (9th Cir. 2001) 240 F.3d 739, 751, fn. 9 (*Gerling Global*); *National Foreign Trade Council v. Natsios* (1st Cir. 1999) 181 F.3d 38, 58-59, fn. 14.) In *Zschernig*, the Supreme Court held, "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress" is unlawful if the state law "has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with

those problems." (*Zschernig*, *supra*, 389 U.S. at pp. 432, 441.) States may enact laws affecting local concerns that touch upon foreign affairs, but only if their actions have "some incidental or indirect effect in foreign nations." (*Id.* at p. 433.)

At issue in *Zschernig* was an Oregon statute providing that a nonresident alien's probate claim to property of Oregon decedents would escheat to the state unless the alien could show the laws of his or her country allowed inheritance of Oregon estates "without confiscation." (*Zschernig*, *supra*, 389 U.S. at p. 430.) Writing for the Court, Justice Douglas concluded, "It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. [Footnote omitted.] The several States, of course, have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. [Citation.] Where those laws conflict with a treaty, they must bow to the superior federal policy. [Citation.] Yet, even in absence of a treaty, a State's policy may disturb foreign relations." (*Id.* at pp. 440-441.)

Zschernig distinguished *Clark v. Allen* (1947) 331 U.S. 503 (*Clark*), which twenty years earlier upheld a similar California probate law. In *Clark*, a California statute provided non-resident aliens could not inherit under a will unless United States citizens were entitled to take under the laws of the foreign country on the same terms as its citizens. Again writing for the Court, Justice Douglas responded to the claim that the California statute "is an

extension of state power into the field of foreign affairs, which is exclusively reserved by the Constitution to the Federal Government." (*Id.* at p. 516.) Noting local law determined rights of succession of property and the California statute was neither preempted by "different or conflicting arrangements" at the federal level or treaties with another country, Justice Douglas concluded the statute did not impermissibly intrude into the field of foreign affairs. (*Id.* at p. 517.) He observed, "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (*Ibid.*)

The distinction between *Clark* and *Zschernig* hinged on the procedural posture of the case before the *Zschernig* court. The record in *Zschernig* contained evidence that, in the administration of statutes similar to the one in Oregon, the probate courts of various states had launched broad and inappropriate inquiries into the structure of foreign nations. The inquiries included (1) whether aliens under their laws had enforceable rights, (2) whether the "rights" were merely dispensations turning upon the whim or caprice of government officials, (3) whether the representations of consuls, ambassadors and other representatives of foreign nations were credible and made in good faith, and (4) whether any element of confiscation was present in the actual administration of the particular foreign system of law. (*Zschernig*, *supra*, 389 U.S. at pp. 433-434.) Because the inquires [sic] resulted in unavoidable criticism of other nations and posed a potential risk of disruption and embarrassment in the international arena, the Supreme Court concluded the Oregon statute had more than an incidental or indirect effect in foreign nations. "That kind of state involvement in foreign affairs

and international relations . . . [,]" said Justice Douglas, "is not sanctioned by *Clark v. Allen*." (*Id.* at p. 436.)

Under *Clark* and *Zschernig*, a statute will be invalidated if its application involves a state making inappropriate inquiries and criticisms regarding the operations of foreign governments so that the statute has "more than 'some incidental or indirect effect in foreign countries.'" (*Zschernig, supra*, 389 U.S. at p. 434; see also *Gerling Global, supra*, 240 F.3d at p. 752-753; *Trojan Technologies, Inc. v. Com. of PA* (3rd Cir. 1990) 916 F.2d 903, 913 (*Trojan Technologies*); *Marootian v. New York Life Ins. Co.* (C.D.Cal. Nov. 28, 2001, No. 99-12073) 2001 U.S.Dist. Lexis 22274 (*Marootian*); see also *Board of Trustees v. City of Baltimore* (Md. 1989) 562 A.2d 720, 746 [where the Maryland appellate court noted, "In explaining the distinction between *Clark v. Allen* and *Zschernig v. Miller*, courts and commentators have focused on the extensive judicial scrutiny and criticism of foreign governments to which the Court referred in the *Zschernig* opinion"].)[8]

2. Cases Applying *Zschernig*

In *Trojan Technologies*, the Third Circuit rejected a foreign affairs challenge by a Canadian corporation concerning a Pennsylvania "Buy American" law. The statute required suppliers who contracted with a public

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[8] *Zschernig* remains the only case where the Supreme Court invalidated a state statute because it violated the foreign affairs power. (See *Barclays Bank PLC v. Franchise Tax Bd. of Cal.* (1994) 512 U.S. 298, 328 [where the Supreme Court made clear that in the absence of controlling federal law, courts have no authority to identify the foreign relations affects of a state law and weight them against the competing legitimate interests of states].)

agency on a public works project to provide American-made products. (*Trojan Technologies, supra*, 916 F.2d at p. 904.) The court held the statute exhibited none of the risks identified in *Zschernig*. The statute did not provide an opportunity for state administrative officials or judges to comment on the nature of foreign regimes. The statute applied to products from any foreign source, without singling out any particular country. The record did not indicate the statute was selectively applied according to foreign policy attitudes of Pennsylvania officials. Finally, Congress was aware of various "Buy American" statutes, but took no action to preempt them through federal legislation. (*Id.* at pp. 913-914.)

In *Gerling Global*, the Ninth Circuit held California's Holocaust Victim's Insurance Relief Act (HVIRA) did not violate the foreign affairs doctrine under *Zschernig*. (*Gerling Global, supra*, 240 F.3d at pp. 741-742.) The HVIRA required California insurers who sold policies in Europe between 1920 and 1945 to file information about the policies with the state insurance commissioner. (See Ins. Code, §13804, subd. (a).) The court held *Zschernig* did not apply to the HVIRA because the plaintiffs were businesses not foreign governments, the HVIRA did not refer to any particular country, and no evidence revealed the HVIRA would be applied in a manner that implicated the diplomatic concerns articulated in *Zschernig*. (*Gerling Global, supra*, 240 F.3d at p. 753.)

Over 30 years ago, in *Estate of Horman* (1971) 5 Cal.3d 62, the California Supreme Court applied the same foreign affairs analysis used in *Trojan Technologies* and *Gerling Global* in rejecting a challenge under *Zschernig*. In that case, a number of citizens of the Soviet Union were heirs to a California estate. The heirs challenged the

constitutionality of Probate Code section 1026, which placed a five-year time limit upon non-resident aliens to claim interests in estates. The Court held, "Probate Code, section 1026 does not involve the state in any inquiry into foreign law, administration of foreign law, credibility of foreign governmental officials or any other matter condemned by *Zschernig*. All that is required by Probate Code, section 1026 is the computation of five years from the date of death of the decedent. The same time period applies to all nonresident aliens alike, regardless of their country of residence, its law or its policies." (*Id.* at p. 80.)

The Court concluded the statute could not "be characterized as having a 'direct impact upon foreign relations,' nor is it likely to 'adversely affect the power of the central government to deal with' foreign relations. At most, its effect upon foreign relations is 'incidental or indirect,' and it does not unconstitutionally impinge upon the exclusive and plenary power of the federal government to deal with foreign affairs." (*Estate of Horman, supra*, 5 Cal.3d at pp. 80-81, citing *Zschernig, supra*, 389 U.S. 429; see also *Amarel v. Connell* (1988) 202 Cal.App.3d 137, 145-146 [claims asserted under California anti-competition statutes do not impermissibly intrude into foreign affairs]; but see *Bethlehem Steel Corp. v. Board of Commissioners* (1969) 276 Cal.App.2d 221, 228 [concluding California's "Buy American" statute had more than an incidental effect on foreign relations because it did impact current trade relations with foreign countries].)

Most recently, a federal district court addressed a *Zchernig* [sic] foreign affairs challenge to California's Armenian Genocide Victims Insurance Act. (See *Marootian, supra*, 2001 U.S.Dist. Lexis 22274.) The statute provides that an Armenian Genocide victim, or victim's

heirs and beneficiaries, may file a legal claim in California courts to recover benefits under any insurance policy issued or in effect between 1875 and 1923. (§354.4.)[9] Similar to section 354.6, section 354.4 allows for venue in California courts, extends the statute of limitations on claims to 2010, and provides for retroactive application. (See §354.4, subd. (c) and S.B. 1915, §1(d).) The defendant insurer argued the statute was unconstitutional because "'it adopts an official position on an extremely sensitive foreign affairs issue.'" (*Marootian, supra*, 2001 U.S.Dist. Lexis 22274 at p. 32.)

Concluding the Ninth Circuit's decision in *Gerling Global* was applicable to section 354.4, the court stated, "Section 354.4, which simply provides venue in the California courts for the disputed . . . insurance claims, does not require the type of wide-ranging government inquiry

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[9] Section 354.4 defines "Armenian Genocide victim" as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period." (§354.4, subd. (a)(1).) The statute further provides, in relevant part: "(b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution. [¶] (c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010."

into a foreign government's practices which the Supreme Court found objectionable in *Zschernig*. As in *Gerling Global*, none of the parties here is a foreign government, nor owned by a foreign government; [footnote omitted] they are simply an insurance carrier and the beneficiaries under its policies of insurance. Also, like the plaintiffs in *Gerling Global*, [the defendant] is an insurance company that does business in California and is, or is related to, companies that issued the insurance policies at issue herein." (*Marootian, supra*, 2001 U.S.Dist. Lexis 22274 at p. 36.)

3. Application of *Zschernig* to this Case

We conclude the above decisions are applicable to section 354.6. We disagree that section 354.6 creates a cause of action where none previously existed and interferes with the federal government's ability to conduct foreign affairs. Instead, we view section 354.6 as essentially a procedural statute designed to allow venue in California courts. Section 354.6 retroactively extends the statute of limitations applicable to claims for unpaid labor and personal injuries against private entities. This conclusion is based upon the following analysis.

First, we discern no improper foreign policy purpose underlying the enactment of section 354.6. The Legislature's purpose in enacting section 354.6 was to assure that "[California] residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War." (S.B. 1245, §1(c).) The declared purpose behind the section is to protect the rights of residents by retroactively extending the statute

of limitations applicable to pre-existing claims and allowing venue in California courts. Not only do states have broad police powers to protect its residents in such a manner, but establishing a statute of limitations is a state prerogative. (See, e.g., *De Canas v. Bica* (1976) 424 U.S 351, 356 [states have broad authority under their police powers to protect their residents]; *Sun Oil Co. v. Wortman* (1988) 486 U.S. 717, 722 (*Sun Oil*) [the procedural rules of state courts, such as statute of limitations, are matters within a state's interest concerning which it may legislate]; see also *People v. Frazer* (1999) 21 Cal.4th 737, 758, 768 [statute of limitations are an "optional form of legislative grace" and as "instruments of public policy" have never been viewed as conferring any fundamental rights rooted in the Constitution].)[10]

We reject the contention that section 354.6 was enacted for an improper foreign policy purpose because it is directed toward a specific foreign country. The statute allows recovery of uncompensated labor performed for "the Nazi regime, its allies or sympathizers, or enterprises transacting business in any of the areas occupied by or under the control of the Nazi regime or its allies and

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[10] Taiheiyo and the United States cite a Los Angeles Times article quoting the legislative author of section 354.6 as indicative of its legislative purpose. Unofficial comments by a single legislative sponsor shed no light on the true intent of the enactment. (See *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-700 [the use of a single senator's statements to determine legislative intent violates well-established principals of statutory construction, even where the senator actually authored the bill in controversy]; *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1134 [judiciary is reluctant to rely on statements by individual members of the Legislature as an expression of the intent of the entire body].)

sympathizers." (§354.6, subds. (a)(1) & (a)(2).) Section 354.6 is not aimed solely at Japanese and German companies. Any company that conducted business in "any of the areas occupied by or under the control of the Nazi regime or its allies and sympathizers" may be sued under the statute. That would include American, British, French and other companies. By its terms, section 354.6 does not target a specific foreign country nor implicate any foreign policy between the United States and Japan. (See *Gerling Global, supra*, 240 F.3d at p. 753 [*Zschernig* not applicable to HVIRA, which was aimed at insurers issuing policies to persons "in Europe"].)

Second, section 354.6 does not involve the type of wide-ranging government scrutiny or criticism of a foreign government's practices that the Supreme Court found objectionable in *Zschernig*. The statute does not require a state court to inquire into current policy of a foreign nation or the structure of its government. In addition, the statute does not make any statement concerning or criticize the current or past foreign policies of any country. It specifically applies to pre-existing monetary claims against private companies, not to foreign governments.

Third, section 354.6 does not have more than "an incidental or indirect effect" on the federal government's current or future relations with any foreign country, such as Japan or Korea, because the statute applies retroactively, not prospectively, to claims against private companies. By allowing the initiation of actions on expired claims for unpaid labor and personal injuries suffered by workers enslaved by private companies during WWII, section 354.6 does not provide a forum to criticize Japan's current policies or practices. The litigation of such claims, at least in Jeong's case, will require evidence of his

imprisonment in Korea, the conditions he endured, the type of labor he performed, the length of time he performed it at Onoda's camp, and the injuries suffered during his imprisonment. However, other than the unique circumstance that the events occurred over 50 years ago, the evidence required at trial will be similar to proof required in any civil case seeking restitution or quasi-contractual recovery for unjust enrichment, false imprisonment, or assault and battery.

There is no basis to conclude that the litigation of slave and forced labor claims will necessarily involve California courts in any criticism of Japan's present governmental structure or foreign policy. The potential that affiliates or subsidiaries of Japanese companies conducting business in California can be held liable for unpaid labor or personal injuries suffered in the past may displease those entities. It may even displease the Japanese government. However, this possible result does not implicate the impermissible governmental inquiries or criticisms the Supreme Court found objectionable in *Zschernig*. (See *Patrickson v. Dole Food Company* (9th Cir. 2001) 251 F.3d 795, 803-804 [courts cannot tailor their decisions to accommodate the displeasure of non-party foreign governments].) As Justice Douglas commented, "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (*Clark, supra*, 331 U.S. at p. 517.)

In sum, section 354.6 permits actions for unpaid labor and personal injuries arising out of events that occurred during WWII. The statute permits the pre-existing claims by retroactively extending the limitations period applicable to the claims. Contrary to the arguments asserted by

Taiheiyo and the United States, the fact that the claims arose during WWII does not automatically implicate the foreign affairs doctrine. Neither Taiheiyo nor the United States has cited any foreign affairs disruption that has resulted, or is likely to result, from actions brought under section 354.6.

4. Distinguishable Case Law

Taiheiyo and amici curiae cite numerous cases which have invalidated state laws under *Zschernig*. They argue these cases are applicable because the state laws were similar to section 354.6. The cases, however, are distinguishable.

In *Miami Light Project v. Miami-Dade County* (S.D.Fla. 2000) 97 F.Supp.2d 1174, ordinances were enacted requiring persons seeking to contract with Miami-Dade County to sign affidavits stating they did not transact business with Cuba or Cuban nationals. The ordinances were passed in response to an international incident that occurred in the Florida Straits where Cuban jet fighters shot down four pilots who were members of a humanitarian organization. In partially granting the plaintiffs' motion for a preliminary injunction, the court concluded the plaintiffs were likely to prevail on their claim that the ordinances were unconstitutional under *Zschernig* because "[t]he stated purpose of the [law] is to protest and condemn Cuba's totalitarian regime . . . [¶] . . . [¶] [and] designed to specifically impact and affect the affairs of a foreign country." (*Id.* at p. 1180.)

In *National Foreign Trade Council v. Natsios, supra,* 181 F.3d 38, a Massachusetts law was enacted restricting the ability of state agencies to purchase goods from

companies doing business in Burma. The court held the law had a significant, direct effect on a foreign government and therefore inappropriately interfered with the federal foreign affairs power under *Zschernig*. The court arrived at this conclusion because the design and intent of the law demonstrated displeasure for Burma's human rights policies, thereby affecting that country's affairs. (*Id.* at p. 53.)

In *Tayyari v. New Mexico State University* (D.N.M. 1980) 495 F.Supp. 1365, New Mexico State University passed a motion "designed to rid the campus of Iranian students." (*Id.* at p. 1367.) The motion sought to retaliate against Iran, which held American hostages at the time, by refusing to enroll Iranian students until the release of the hostages. The court invalidated the motion as imposing an impermissible burden on the federal government's power to regulate immigration and conduct foreign affairs because the "motion [was] directed at one nation, Iran. [The] purpose was to make a political statement about the hostage situation in Iran and to retaliate against Iranian nationals here." (*Id.* at pp. 1379-1380.)

In each case, the state law was invalidated because it was designed to influence a current policy of a foreign government that was considered offensive and had the potential to adversely affect trade or diplomatic relations with a foreign country. By contrast, section 354.6 is restricted to the past conduct of private companies. The statute does not permit the assertion of claims against Japan or any other country. It does not attempt to affect foreign trade or influence the policies of any foreign government.

The sole purpose of section 354.6 is to extend the statute of limitations for common law claims for unpaid labor and personal injuries arising out of slave or forced labor. Not only is this a permissible state function, but there is no reason to believe the adjudication of the claims will interfere with the federal government's ability to conduct foreign affairs. Any effect the adjudication of claims under section 354.6 may have on foreign nations is merely incidental and indirect.[11]

D. Due Process

Taiheiyo contends section 354.6 violates its right to due process. Citing *Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797 (*Shutts*) and *Gerling Global Reinsurance Corp. v. Gallagher* (11th Cir. 2001) 267 F.3d 1228, Taiheiyo argues "California has no power to reach across the seas and into the long distant past to legislate civil penalties for parties who had no contemporaneous connection with California." This contention not only mischaracterizes section 354.6, but ignores well-established precedent that a state has the legislative jurisdiction to control the remedies available in its courts.

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[11] Other cases cited by Taiheiyo and amici curiae are similarly distinguishable. (See *Springfield Rare Coin Galleries v. Johnson* (1986) 115 Ill.2d 221, 236 [regulation exempting all gold and silver coins from taxation except the Krugerrand held invalid because it was designed to express disapproval of South Africa's apartheid policy]; *New York Times Co. v. City of New York Com'n* (1977) 41 N.Y.2d 345, 352 [city prohibition on advertising job opportunities in South Africa held impermissible because its purpose was to impose an economic boycott aimed at South Africa's apartheid policy].)

In *Shutts*, the Supreme Court held the U.S. Constitution limits a forum state's application of its substantive law to the claims of nonresident plaintiffs in a nationwide class action. In order to constitutionally apply its substantive law to the claims of nonresident class members, the forum state must have "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair. [Citation.]" (*Shutts, supra*, 472 U.S. at pp. 821-822.) Because in *Shutts* the forum state lacked interest in claims unrelated to that state asserted by nonresidents, the Court concluded the application of that state's law to every claim in the case was sufficiently arbitrary and unfair as to exceed constitutional limits. (*Ibid.*)

Shutts is inapplicable because section 354.6 is essentially a procedural statue [sic] designed to extend the applicable statute of limitations and allow venue in California courts. Thus, it must be evaluated under the standards the Supreme Court articulated in *Sun Oil, supra*, 486 U.S. 717. (See *Marootian, supra*, 2001 U.S.Dist. Lexis 22274 at p. 36 [concluding section 354.4 (the Armenian Genocide Victims Insurance Act) is a procedural statute establishing venue in California, does not implicate due process, and should be evaluated under *Sun Oil*].)

In *Sun Oil*, Kansas courts applied a longer Kansas statute of limitations to claims by residents of other states concerning property located in those states and governed by the laws of those states. The Supreme Court characterized the Kansas statute of limitations as a procedural rule and concluded: "This Court has long and repeatedly held that the Constitution does not bar application of the forum

State's statute of limitations to claims that in their substance are and must be governed by the law of a different State. . . . [¶] Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts." (*Sun Oil, supra*, 486 U.S. at p. 722.)

In rejecting defendant's due process challenge, the Court added: "A State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations. Moreover, petitioner could in no way have been unfairly surprised by the application to it of a rule that is as old as the Republic. There is, in short, nothing in Kansas's action here that is 'arbitrary or unfair,' [citation] and the due process challenge is entirely without substance." (*Sun Oil, supra*, 486 U.S. at p. 730.)

Section 354.6, which is placed in the Code of Civil Procedure title dealing with statute of limitations, extends the limitations period applicable to claims of slave and forced labor victims for unpaid labor and personal injuries. It further specifies that their claims may be filed and adjudicated in California courts. The statute neither specifies the essential elements of the claims nor mandates the application of California substantive law. It is, in essence, a procedural statute. Contrary to Taiheiyo's assertions, section 354.6 does not create a new cause of action where none previously existed. The claims of victims like Jeong for unpaid labor and personal injuries existed prior to section 354.6's enactment and would have been viable common law claims under California law, both

when they arose and today, had they not been time-barred. (See, e.g., *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 517 and *McCall v. Superior Court* (1934) 1 Cal.2d 527, 531 [recognizing right to restitution or quasi-contractual recovery based upon unjust enrichment]; *Pulvermacher v. Los Angeles Co-ordinating Com.* (1943) 61 Cal.App.2d 704 and *Trube v. Katz* (1923) 60 Cal.App. 474 [allowing claims for false imprisonment and assault].)[12]

Consistent with *Sun Oil*, by enacting section 354.6, the Legislature has assessed the workload of California courts and decided that public policy mandated a consideration of slave and forced labor claims like Jeong's, despite the length of time that had elapsed since the occurrence of events underlying those claims. (See *Marootian, supra*, 2001 U.S.Dist. Lexis 22274 at p. 36.)

Just as *Shutts* is inapplicable, so is *Gerling Global Reinsurance Corp. v. Gallagher, supra*, 267 F.3d 1228. In that case, the Florida insurance commissioner issued subpoenas to Florida insurers asking for information about their German affiliates' issuance of policies to Holocaust victims. The Eleventh Circuit addressed the narrow issue of whether Florida's Holocaust Victims Insurance Act (Act) could, consistent with due process, form the basis for issuance of the subpoenas. The Act required Florida insurers to file extensive information concerning Holocaust-era policies with the commissioner and authorized penalties for failing to do so. The court

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[12] We do not decide whether California substantive law should apply to the claims for unpaid labor and personal injuries asserted in this case. We conclude only that section 354.6 may validly be applied to revive and retroactively extend the statute of limitations applicable to such claims.

held the Act could not form the basis for issuance of the subpoenas because it pertained to and sought "to regulate . . . a subject matter – the German affiliates' payment or non-payment of Holocaust-era policy claims – with no jurisdictionally-significant relationship to Florida." (*Id.* at p. 1238.)

By contrast, section 354.6 does not seek to substantively regulate by requiring extensive reporting information to any agency, nor does it provide penalties for failing to do so. Rather, section 354.6 is essentially a procedural statute that permits slave and forced labor victims to adjudicate their claims in California courts. The claims existed prior to the enactment of the statute.

Finally, the fact that section 354.6 extends the applicable statute of limitations retroactively does not violate due process. The retroactive application of a statute is proper as long as the Legislature intended to apply it retroactively, is not an ex post facto law, and does not deprive a person of a vested right without due process of law or impair the obligation of a contract. (*In re Marriage of Buol* (1985) 39 Cal.3d 751, 756.) No assertion is made that section 354.6 is an ex post facto law, deprives Taiheiyo of a vested right, or impairs the obligation of a contract.

Section 354.6 is similar to statutes that revive the prosecution of otherwise time-barred criminal offenses. (See, e.g., Pen. Code, §§803, subds. (f), (g), (h).) Penal Code section 803, subdivision (g), for example, expressly "revived" the prosecution of certain sexual crimes against children in which the three- or six-year statute of limitations expired. In *People v. Frazer, supra*, 21 Cal.4th 737, the Supreme Court upheld the statute against a challenge

it violated due process by retroactively reviving a dead cause of action. The Court discussed *Chase Securities Corp. v. Donaldson* (1945) 325 U.S. 304, where the U.S. Supreme Court upheld retroactive changes in the applicable limitations period which were detrimental to the defense. The Court concluded, "The holding of *Chase* – that no constitutionally protected interest arises once a statute of limitations has run, and that such protection can be retroactively withdrawn consistent with due process – has been reaffirmed by the high court in subsequent cases. [Citations.] . . . [¶] We see no meaningful basis on which to distinguish the six-year period [in this case] from the statute of limitations discussed in *Chase* . . . . That this case involves a criminal, rather than a civil, statute of limitations is not such a persuasive distinction. No provision of the United States Constitution explicitly confers upon criminal defendants a 'right to repose' by virtue of the length of time between commission of the crime and commencement of the prosecution. . . . [¶] [C]riminal statutes of limitation are no less an act of 'policy' or 'grace' than their counterparts in civil cases. [Citation.]" (*People v. Frazer, supra,* 21 Cal.4th at pp. 768-770.)

Because the Legislature made clear in enacting section 354.6 that the applicable statute of limitations for slave labor and forced labor claims should be extended retroactively, we conclude retroactivity is proper and does not violate constitutional protections. (See § 354.6, subd. (c); S.B.1245, § 1(d).)

E. Political Question Doctrine

Taiheiyo lastly contends lawsuits under section 354.6 raise non-justiciable political questions because they present claims for war reparations, which the Constitution exclusively reserved for the federal government. Taiheiyo argues the federal government dealt with the issue of Japanese war reparations through the 1951 Treaty and, as a result, California courts may not revisit or subvert this political resolution. We reject this contention.[13]

The "political question doctrine" requires courts to defer to the other branches of government operating within their spheres of authority. (*Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1213-1214.) The doctrine "compels dismissal of a lawsuit when complete deference to the role of the legislative or executive branch is required and there is nothing upon which a court can adjudicate without impermissibly intruding upon the authority of another branch of government." (*Ibid.*)

Contrary to Taiheiyo's broad assertion that "[q]uestions involving interference with foreign relations are quintessential 'political questions,'" the Supreme Court has cautioned against such sweeping statements. (See *Baker v. Carr* (1962) 369 U.S. 186, 211; *Japan Whaling Assn. v.*

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[13] Jeong contends Taiheiyo's political question argument is not properly before the court because that argument was raised only in Taiheiyo's initial motion for judgment on the pleadings, which the trial court denied and from which Taiheiyo did not seek appellate review. The order to show cause limited our review to the trial court's denial of Taiheiyo's second motion for judgment on the pleadings, in which the political question argument was not raised. We nonetheless address it because it is an issue of law that was fully briefed and argued by the parties.

merican Cetacean Soc. (1986) 478 U.S. 221, 229-230.) In *apan Whaling Assn. v. American Cetacean Soc., supra*, he United States agreed not to certify Japan was in iolation of an international whaling treaty. Conservation roups sued to force the Department of Commerce to ertify Japan was in violation of the treaty. The district ourt granted the requested relief.

The Supreme Court rejected the contention asserted y the Japanese petitioners that the political question loctrine barred resolution of the case by the courts. The Court said, "*Baker* carefully pointed out that not every natter touching on politics is a political question. . . . The olitical question doctrine excludes from judicial review hose controversies which revolve around policy choices nd value determinations constitutionally committed for esolution to the halls of Congress or the confines of the Executive Branch. . . . [¶] As *Baker* plainly held, however, he courts have the authority to construe treaties and xecutive agreements, and it goes without saying that nterpreting congressional legislation is a recurring and ccepted task for the federal courts. . . . [U]nder the Constitution, one of the Judiciary's characteristic roles is o interpret statutes, and we cannot shirk this responsibil-ty merely because our decision may have significant olitical overtones. We conclude, therefore, that the resent cases present a justiciable controversy . . . . " (*Id.* t pp. 229-230.) Other cases are in accord. (See *Klinghoffer . S.N.C. Achille Lauro* (2d Cir. 1998) 937 F.2d 44, 49 political question doctrine did no [sic] bar suit against LO for seizure, beating, and killing of passenger]; *Kadic . Karadzic* (2d Cir. 1995) 70 F.3d 232, 248-250 [political uestion doctrine did not bar private tort claims under lien Tort Act against self-proclaimed president of the

unrecognized Bosnian-Serb republic of Srpska for systematic human rights atrocities].)

Courts confronted with actions under section 354.6 are not presented with non-justiciable political questions. Section 354.6 is essentially a procedural statute that revives stale tort and quasi-contract claims for unpaid labor and personal injuries and permits venue in California courts. The Legislature assessed the workload of California courts and determined that public policy mandates a consideration of slave and forced labor claims, despite the length of time that elapsed since the occurrences giving rise to the claims. Not only is the Legislature empowered to enact such laws in an attempt to redress the injuries of its residents, but the adjudication of similar claims is a traditional judicial function courts are called upon to address on a daily basis. Evaluating evidence concerning whether a person suffered personal injuries, was falsely imprisoned, and forced to work without pay is clearly a fact-finding function granted to the judicial branch of government. The performance of that role does not involve addressing political questions or usurp the governmental functions of the legislative and executive branches.

Furthermore, contrary to Taiheiyo's contention that there are no "judicially discoverable and manageable standards" which California courts may apply to claims under section 354.6, standards do in fact exist. As another court concluded, "because the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of 'judicially discoverable and manageable standards.'" (*Klinghoffer v. S.N.C. Achille Laura, supra*, 937 F.2d at p. 49.)

In sum, Taiheiyo and amici curiae have not cited to any ongoing negotiations by the United States that address claims such as Jeong's. There is no indication that actions brought under section 354.6 will impermissibly intrude upon the authority or interest of another branch of government.

F. Conclusion

By enacting section 354.6, the California Legislature has determined that public policy mandates a judicial consideration of slave and forced labor claims despite the length of time that has elapsed since the occurrence of events underlying those claims. The Legislature has accomplished this policy by retroactively extending the limitations period for narrowly defined categories of pre-existing claims in order to permit the redress of injuries of California residents. This legislative enactment was an appropriate exercise of the state's sovereign powers. We therefore conclude section 354.6 is valid because (1) no federal treaty or other law preempts it, (2) the enactment poses at most merely an incidental or indirect effect on foreign countries, (3) the statute does not violate constitutional due process, and (4) the claims it allows do not present non-justiciable political questions.

DISPOSITION

The petition for writ of mandate is denied, the order to show cause is discharged, and the stay of trial court proceedings previously issued is dissolved. Jeong is awarded his costs.

CERTIFIED FOR PUBLICATION

BOLAND, J.

We concur:

COOPER, P.J.

RUBIN, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Jae Won Jeong, Plaintiff, vs. Onoda Cement Co. Ltd, et al., Defendants	**Case No. BC217805** **Assigned:** **Hon. Peter D. Lichtman** **Court's Ruling Re:** **Defendants' Second Motion for Judgment on the Pleadings** **Hearing Held:** **November 7, 2001** **Submitted:** **November 7, 2001**

(Filed Nov. 29, 2001)

Introduction

On November 7, 2001, this Court heard the arguments of counsel with respect to Defendants' Motion for Judgment on the Pleadings.[1]

[1] This is defendant's ***second*** Motion For Judgment On The Pleadings. The first motion was heard on August 30th, 2001 and was denied by this Court on September 14, 2001. This ***second*** motion purports to be a separate and distinct motion that addresses issues of constitutionality that were allegedly reserved for a later hearing. At the outset, it should be noted that this Court disagrees with defendants' characterization of the instant motion and finds that it is an attempt to seek reconsideration of the Court's prior ruling. However, this finding is of no moment in light of the District Court's Order No. 10 (issued September 17, 2001) and the Statement of Interest submitted November 5, 2001 by the United States of America for consideration at the instant hearing. Notwithstanding the above, this Court has chosen to address those points raised by both the District Court and the United States.

The moving defendants are identified as follows: Taiheiyo Cement U.S.A., Inc.; Taiheiyo Cement Corporation; Glacier Northwest, Inc. (fka Lone Star Northwest, Inc.) and the California Portland Cement Company.

Having read and considered all moving and opposing points and authorities as well as the Statement of Interest filed on behalf of the United States of America and Orders Nos. 10 & 11 authored by the Hon. Vaughn R. Walker of the United States District Court for the Northern District of California, this Court now proceeds with its ruling.

Court's Ruling and Analysis

This ***second*** motion for judgment on the pleadings is based on three (3) grounds:

First, defendants ask this Court to re-visit the issue of whether CCP § 354.6 is unconstitutional under ***Zschernig v. Miller*** (1968) 389 U.S. 429 in light of the District Court's long-awaited ruling in ***In re World War II Era Japanese Forced Labor Litigation,*** MDL 1347, Order No. 10.[2]

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[2] One business day after this Court's September 14 Order, in ***In re World War II Era Japanese Forced Labor Litigation,*** MDL 1347, Order No. 10, 2001 WL 1112753 (N.D. Cal. 2001), U.S. District Judge Vaughn Walker dismissed seven cases brought by Korean and Chinese plaintiffs under §354.6 seeking compensation for "forced labor" allegedly performed for Japanese companies during the war ("MDL Order No. 10"). The District Court found that §354.6 was unconstitutional as applied to the defendants therein because it infringes upon the "exclusive foreign affairs power of the United States," and that the attendant causes for "unjust enrichment" and "unfair competition" were time-barred. These issues were originally argued in the District Court in December of last year. Defendants now bring the same motion before this Court.

Second, defendants contend that CCP § 354.6 is unconstitutional since it violates due process by attempting to reach conduct that has no connection to California and retroactively imposes penalties.

Third, defendants contend that plaintiffs claims for unjust enrichment, unfair business practices and injuries in tort are barred by the statute of limitations.

The District Court's Order No. 10

At the outset this Court feels that it is necessary to address the precedential value, if any, that Order No. 10 of the U.S. District Court has upon this Court (having been issued subsequent to this Court's ruling of September 14, 2001). In that regard, this Court notes that "*While decisions of the United States Supreme Court are binding on state courts on federal questions, 'the decisions of the lower courts while persuasive, are not binding on us. [citation]* Thus, in the absence of a controlling United States Supreme Court Opinion, we make an independent determination of law.'" ***Wagner v. Apex Marine Ship. Manag. Corp.*** (1st Dist. 2000) 83 Cal. App. 4th 1444, 1451. (Quoting ***Forsyth v. Jones*** (1997) 57 Cal. App. 4th 776); ***People v. Bradley*** (1969) 1 Cal. 3d 80, 86 ("We are not bound by the decisions of the lower court even on federal questions"). Hence, there does not appear to be any dispute that the District Court's order is not binding on this Court and that this Court is free to make an independent determination of the law. Accordingly, this Court now proceeds with its own independent review of the issues presented.

On August 30th, 2001 these moving defendants addressed virtually all of the arguments that they now proffer inclusive of the issue of implied preemption. This

Court permitted ample oral argument on August 30th so as to examine all of the cases and points that concern the doctrine of implied preemption.

On September 14, 2001 this Court issued its 18 page written opinion wherein it discussed, at length, the issues that the defendants now want this Court to revisit.[3] Notwithstanding the duplicative nature of the arguments and issues presented this Court will, once again, articulate its reasons for its prior decision as well as further elaborate on the points raised by the Statement of Interest submitted by the United States of America and the District Court's Order No. 10.

The District Court's Application of the Zschernig Doctrine

In order to understand some of the concerns that this Court has encountered with the District Court's opinion it is important to fully understand the breadth and extent of the U. S. Supreme Court's ruling in ***Zschernig***. In ***Zschernig***, the U.S. Supreme Court observed that the Constitution entrusts "the field of foreign affairs – to the President and the Congress" *Id.* at page 432. The Court concluded that, as a result, (of said entrustment) the Constitution itself excludes State intrusion on the Federal government's authority over foreign affairs even when the federal branches have not acted. Accordingly, ***Zschernig*** stands for the proposition that even in the absence of a

[3] In particular, this Court took a great deal of time to carefully consider the ***Zschernig*** case and its application to CCP § 354.6. Specifically, this Court explained its decision on that issue at pages 15-17 of its previous ruling.

treaty [or other federal law] a State's policy may not disturb foreign relations. This Court does not dispute the language and the law as promulgated by the ***Zschernig*** court. Rather, this Court is troubled by the District Court's ruling which fails to follow the Ninth Circuit's guidelines and pronouncements as set forth in ***Gerling Global.***

In ***Gerling Global Insurance Corp. of America v. Low*** (9th Cir. 2001) 240 F. 3rd 739, the Ninth Circuit recognized that the implied preemption theory first utilized by the Supreme Court in ***Zschernig*** "is rarely invoked by the courts [and] the Supreme Court has not applied it in more than 30 years." *Id.* Moreover, to the extent that ***Zschernig*** retained any validity, a point which is open to question, it should be applied *sparingly* ***and*** *with hesitation.* See *id.* at 753. ***Zschering*** [sic] itself recognized that more is required to invalidate a state law than the mere fact that the statute might have "some incidental or indirect effect in foreign countries." *Id.* at 752 (citing ***Zschering*** [sic] and ***Clark v. Allen*** (1947) 331 U.S. 503, 517).

In the case at bar, as in ***Gerling Global,*** no party to the civilian internee forced labor compensation cases before this Court is a **foreign government** or is owned, in whole or in part, by a **foreign government**. Rather, as in ***Gerling Global,*** the objecting parties "are, simply, businesses." *Id.* at 753. The statute is not directed at a particular foreign country. *Id.* At most, like the HVIRA (Holocaust Victims Insurance Relief Act) at issue in ***Gerling Global,*** California CCP § 354.6 targets past (World War II era) conduct that was clearly illegal prior to World War II. As in ***Gerling Global, "Zschering*** [sic] does not govern." *Id.*

In particular, there is no question that CCP § 354.6 does not target a particular country. The Court in ***Gerling Global*** likewise found that the Holocaust Victim Relief Act **(a parallel statute to § 354.6 of the CCP)** did not target a particular country. Section 354.6 of the CCP targets all slave labor for ***"the Nazi regime, its allies or sympathizers, or enterprises transacting business in any of the areas occupied by or under the control of the Nazi regime or its allies and sympathizers."*** Cal. Code Civ. Pro. § 354.6(a)(1) (emphasis added). Under section 354.6(a)(1), any company can be sued – even American, British, French, and Canadian owned companies – which employed slave labor as defined in §354.6(a)(1). Section 354.6 is not directed only at Japanese, German, and Italian companies as Defendants attempt to claim. Simply put, CCP §354.6 does not implicate any foreign policy by and between the United States and Japan.

Faced with the Ninth Circuit's refusal to apply ***Zschernig***, the District Court seeks to distinguish the Court's ruling in ***Gerling Global*** as involving an area of authority "delegated to the states" (i.e. insurance regulation). Order No. 10 at 26. However, this alleged distinguishing fact is unavailing. Specifically, CCP § 354.6 – the forum's statute of limitations – is constitutionally committed to the states. The commitment of the issue of forum statute of limitations to State authority is far older, and better established, than even the issue of insurance regulation found in ***Gerling Global.*** The **State** interest at stake (in the case at bar) deals with a State's right to determine its own time table for the initiation of claims for past wrongs, i.e. its own Statute of Limitations. CCP § 354.6 simply permits these claims to proceed now and

not be deemed time barred due to the passage of time. Once again, the foreign policy of the United States of America is in no way implicated.

There is no dispute, factual or otherwise, that Mr. Jeong's claims are not barred by either the Treaty of Peace of 1951 or the Japan-Korea Accord of 1965. Even the argument proffered by counsel for the Untied States of America concedes that Mr. Jeong's claims were not barred by either of the above.

Hence, the issue before this Court is whether a state may enact a statute that revives such claims by extending the time period in which such claims may be brought. In other words, does the State of California have the right to control and/or determine its own statute of limitations? The answer must be in the affirmative. If the preceding premise is true then it must likewise follow that the Ninth Circuit's analysis in ***Gerling Global***, if followed in a consistent manner, would mandate that ***Zschernig*** once again be rejected since the statute in question involves an area of authority delegated to the States, i.e. the statute of limitations.

In order to reach beyond the Court's ruling in ***Gerling***, the District Court argues that Section 354.6 **improperly had a foreign policy purpose**. Order No. 10 at 23-24. However, this fact was not found relevant to the HVIRA in ***Gerling Global,*** see 240 F.3d at 751-753. Moreover, the District Court does not cite to a single case where a legislator's comments on past conduct has been relevant under ***Zschernig***. Indeed, the concern in ***Zschernig*** itself was that courts would apply different laws based upon the current type of governments (democracy versus Marxist) that existed in foreign states. 389 U.S. at 435-36.

These concerns simply do not apply in this case as the statute in question does not comment on, or lead to criticism of the current, as opposed to past government of Japan. Indeed, tort lawsuits which invite criticism of prior foreign governments are commonly accepted and heard in courts of this land without being dismissed. See e.g., ***Hilao v. Marcos*** (9th Cir. 1986) 103 F.3d 789

The District Court, although acknowledging that any claimed criticism would be for past acts, simply suggests that Japan's current regime ***"could not avoid"*** being criticized. Regrettably, the District Court ***never*** explains, nor is it apparent, how Japan's current government is even remotely relevant to Plaintiff's claims. Once again it bears repeating that the case before this Court involves claims by private individuals against private companies doing business in or having contacts with California. The claims being asserted ***are not being prosecuted against the government of Japan.***

The District Court's assumption that Japan's current official (as opposed to past) acts are being challenged is linked to the assertion that relations between Japan and the U.S. would be harmed by this suit. Order No. 10 at 27-29. However, other than accepting Japanese government pronouncements of damage to foreign relations at face value, neither the District Court nor the Japanese government or the U.S. State Department ever explain exactly how it is that adjudicating claims against private Japanese companies for past conduct will cause a diplomatic incident. Judge Kosinski's admonition (noted by this Court in its September 14th ruling) in ***Patrickson v. Dole Food Co., Inc.*** (9th Cir. 2001) 251 F.3d 795, 803-4, bears reiterating: The courts cannot tailor their rulings to

accommodate the displeasure of non-party foreign governments.

The District Court's Order cites 5 cases that have followed ***Zschernig***. However, it should be noted that each of these cases is readily distinguishable. Four of the cases cited involve an ongoing live issue with a foreign government. See e.g., ***National Foreign Trade Council v. Natsios*** (1st Circuit 1999) 181 F.3d 38, 51 (dispute over Burma's current domestic policy); ***Tayyari v. New Mexico State University*** (D.N.M. 1980) 495 F. Supp. 1365, 1376 (dispute with Iranian government over taking of hostages); ***Springfield Rare Coin Galleries, Inc. v. Johnson*** (1986) 115 Ill. 2d 221, 236 (import of goods from South Africa during Apartheid); ***New York Times Co. v. New York*** (1977) 41 N.Y. 2d 345, 352 (same). No such issue with a current government exists in this case. The claims asserted only involve private companies' **past** acts.

More importantly, four of the cases cited by the District Court involve efforts to make a foreign government **change its current and future policies**. See e.g., ***Natsios***, 181 F.3d at 51 (law was intended to pressure Burmese government to change policy); ***Tayyari***, 495 F. Supp. at 1376 (policy designed to punish Iranian government); ***Johnson***, 115 Ill. 2d at 236, (policy to punish South African government to change Apartheid policies); ***New York Times Co.***, 41 N.Y. 2d at 352 (same). Each of the legislative efforts at issue in the cases cited above had the ability to directly affect ongoing trade or diplomatic relations with numerous foreign nations. See e.g., ***Natsios***, 181 F.3d at 54 (statute affected current trade relations with Burma and other countries); ***Tayyari***, 495 F. Supp. at 1378-79 (actions against Iranian students would adversely affect current efforts to obtain release of

hostages in Iran); ***Johnson***, 115 Ill. 2d at 236 (imposition of de facto embargo would interfere with ongoing trade relations); ***New York Times Co.***, 41 N.Y. 2d at 352 (same). None of the cases cited by the District Court involved an effort to adjudicate claims of individuals for past conduct.

The final case cited by the District Court, ***Bethlehem Steel Corp. v. Bd. of Comm.***(1969) 276 Cal. App. 2d 221, involved California's Buy American Statute. Although the law did not directly and prospectively attempt to change foreign government policies, as in ***Zschernig*** and the above-cited cases, the court observed that the Buy American Statute affected current ongoing trading relationships and "invited retaliative restrictions on our own trade." 276 Cal. App. 2d at 228. Nothing in the current suit implicates such trade concerns and CCP § 354.6 causes no impact whatsoever with respect to trade and/or foreign policy.

Simply put, the court's holding in ***Gerling Global*** is dispositive of the issue before this Court. The court in ***Gerling Global*** chose not to follow ***Zschernig*** and likewise found that it was not to be applied in its analysis of the HVIRA (a parallel statute). This Court believes that the ***Gerling*** decision is and was binding precedent on the lower District Court; yet not followed. For all the reasons set forth above, this Court respectfully declines to follow the District Court's orders and finds that said rulings lack persuasive reasoning and are inconsistent with the reasoning of the Ninth Circuit in both ***Gerling Global Insurance Corp. of America v. Low*** (9th Cir. 2001) 240 F. 3rd 739 and ***Patrickson v. Dole Food Co., Inc.*** (9th Cir. 2001) 251 F.3d 795.

United States of America's Statement of Interest

At the time of the hearing on defendants' first motion for judgment on the pleadings, the United States **did not** file any statement of interest. After the District Court's ruling of September 17, 2001 and 5 days prior to the hearing on defendants' second motion for judgment on the pleadings, the United States of America filed a Statement of Interest asserting that CCP § 354.6 is unconstitutional on the grounds that it impermissibly invades the field of foreign affairs.

In dealing with the arguments asserted by the United States of America it is interesting to note that with respect to the Holocaust Victims Insurance Relief Act there was no Statement of Interest asserted by the federal government. In fact, no challenge was made to those claims being made by Holocaust victims and/or victims of the European Theatre of World War II. When this Court queried counsel for the United States as to why no position was taken vis a vis Holocaust victims, the response was that this Court cannot glean any inference by the government's action or inaction. Additionally, the argument was made by counsel for the United States that the German government specifically invited the United States to participate in the resolution of Holocaust claims. During the course of oral argument, this Court again pressed counsel for the United States to explain why there was no challenge to claims being asserted by Holocaust victims yet a challenge is mounted to claims proffered by the victims of the War in the Pacific. The response to this inquiry was met with a simple retort that the Constitution permits the United States to promulgate its own foreign policy and for this reason the individual states cannot question why the United States has acted in any particular way.

In light of the above, it struck this Court that the United States has issued its Statements of Interest in a somewhat disparate fashion. While, on the one hand, victims of the European Theatre can proceed to seek reparations against ***"the Nazi regime, its allies or sympathizers . . . "*** yet, on the other hand, victims of the Pacific Theatre may not. Facially, this policy, if it is a policy, appears to be legally unsupportable. This Court is greatly troubled by this approach.

The United States concedes that the claims asserted by Mr. Jeong are not barred by the Treaty of Peace of 1951 and are likewise not barred by the Japan-Korea Accord of 1965. Rather, the argument asserted by the United States is that to permit Mr. Jeong to proceed with his claims when the United States and its POWs are barred would lead to an incongruous result, i.e., to permit the United States to play host (through the use of its courts) to war time claims that were given up long ago in its Treaty of Peace. In particular, by allowing Mr. Jeong to proceed, the United States argues that it is permitting its Court system to do that which it had waived through the signing of the Treaty. While this Court understands the argument that is being proffered, it is nonetheless troubled by the uneven manner in which the United States is submitting its Statements of Interest vis a vis the various victims of World War II. The United States' response to the difficulty this Court is having is simply that these matters involve foreign affairs and the States have no right to interfere and/or even question. Hence, the question that this Court must return to is whether or not CCP § 354.6 intrudes on the foreign affairs of the government of the United States of America. **In light of the above case analysis this Court must conclude that it does not.** The Ninth

Circuit in ***Gerlling*** [sic] ***Global*** has addressed this issue when faced with a parallel statute and has permitted the questioned statute to stand. This Court follows that decision.

CCP § 354.6 Does Not Violate The Due Process Clause

Defendants contend that the statute is a "disfavored" retroactive law. However, it has "long stood as a statement of the law" that, "where lapse of time has not invested a party with title to real or personal property, a state legislature, consistent with the Fourteenth Amendment, may repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar." **Chase Sec. Corp. v. *Donaldson*** (1945) 325 U.S. 304, 311-12(Jackson. J.)

In ***Sun Oil Co. v. Wortman*** (1988) 486 U.S. 717, 722, the Supreme Court held that the Kansas courts were entitled to apply the Kansas statute of limitations "to claims by residents of other states concerning properties located in those States" even when those claims were governed by the "law of the other States," *Id.* at 721. The court, per Justice Scalia, gave short shrift to the defendants' claims that the application of the longer Kansas limitations period was a denial of due process. "A State's interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations. Moreover, petitioner could in no way have been unfairly surprised by the application to it of a rule that is as old as the Republic. There is, in short,

nothing in Kansas' action here that is 'arbitrary or unfair,' . . . and the due process challenge is entirely without substance." *Id.* at 730 (quoting ***Phillips Petroleum Co. v. Shutts*** (1985) 472 U.S. 797, 821-22). The result follows *a fortiori* here, where this case does not concern out-of-state real property but instead labor and injury claims personal to the Plaintiff. As the forum state, California may validly enforce its own statute of limitations, and no due process clause issues are even raised by the application of forum procedural law.

Conclusion

To conclude, this Court denies, for a second time, defendants' motion for judgment on the pleadings. A copy of this Court's ruling is served on all counsel of record via U. S. mail. Notwithstanding the denial of the instant motion, this Court does recognize that its ruling when juxtaposed with the District Court's Orders Nos. 10 and 11 will necessitate appellate review. Hence, this Court stays the instant action for 21 days from the date set forth herein below so as to permit the defendants to seek writ review as well as a stay. The stay referenced above does not affect this Court's discovery ruling of October 29, 2001. All previously ordered discovery must proceed. Additionally, this Court's stay order will automatically dissolve 21 days from the date set forth herein below.

Dated: 11-29, 2001

PETER D. LICHTMAN
Peter D. Lichtman
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Jae Won Jeong, Plaintiff, vs. Onoda Cement Co. Ltd, et al., Defendants	**Case No. BC217805** **Assigned:** **Hon. Peter D. Lichtman** **Court's Ruling Re:** **Defendants' Motion for Judgment on the Pleadings.** **Hearing Held:** **August 30, 2001** **Submitted:** **August 30, 2001**

(Filed Sep. 14 2001)

On August 30, 2001, this Court heard the arguments of counsel with respect to Defendants' Motion for Judgment on the Pleadings. The moving defendants are identified as follows: Taiheiyo Cement U.S.A., Inc.; Taiheiyo Cement Corporation; Glacier Northwest, Inc. (fka Lone Star Northwest, Inc.) and the California Portland Cement Company.

The instant motion is based on two grounds. First, that this Court has no jurisdiction over the subject of the causes of action alleged in the complaint; and second, that the complaint fails to state facts sufficient to constitute causes of action against the defendants or any of them.

Having read and considered all moving and opposing points and authorities this Court now proceeds with its ruling.

Facts Pled

The starting point for the analysis of the instant motion is the complaint and the facts that have been pled. For purposes of a Motion for Judgment on the Pleadings (sometimes hereinafter referred to as a JOP), the plaintiffs factual allegations – but not his legal conclusions – ***are treated as true. Baughman v. California*** (1995) 38 Cal. App. 4th 182, 187.

Plaintiff Jeong, now a United States citizen, was a Korean student in 1943, during World War II, attending Hosei University in Tokyo (Complaint ¶¶ 56, 57). When Jeong refused the Japanese government's order that he and other students report to the Japanese military for service, he was detained by the Japanese police and later sent to Korea. (Complaint ¶¶ 59-60). Once in Korea, Jeong was imprisoned by the Japanese **"colonial" government authorities**, and sent to a prison camp for "volunteer soldier training." (Complaint ¶¶ 60-61). In January, 1944, Jeong was transferred by such government authorities to another camp in Korea, which was operated "by and for the benefit of the Japanese Onoda Cement Manufacturing Company under the color of Japanese authority." (Complaint ¶¶ 62-63). Since "World War II imposed great demands on the Japanese industry, which suffered from an acute shortage of workers," in order to meet such war-related demands Jeong alleges that the Japanese government set up programs whereby "Korean nationals and Allied prisoners" were used to perform forced labor. (Complaint ¶¶ 68-69). This was to "benefit the Japanese war effort." (Complaint ¶ 69). While at the camp, Jeong and other workers were forced to perform "hard physical" labor, for which they were not paid. (Complaint ¶¶ 64-65).

Jeong alleges that he suffered injuries during this period as a result of this labor. (Complaint ¶66).[1]

In accordance with the facts alleged above, Jeong has now brought suit on his own behalf and as a representative of a putative class of "[e]ach United States citizen and resident of the United States (or legal representative of his estate) who, [sic] was forced to perform labor for the benefit of Onoda and its affiliates at any time between 1929 and 1945," asserting California state law against the defendants per § 354.6 of the Code of Civil Procedure for compensation for labor performed and injuries sustained, as well as for "unjust enrichment, injuries in tort, and unlawful, unfair and fraudulent business practices."

The Contentions of the Defendants

The defendants assert a number of arguments to support their motion for judgment on the pleadings. First and perhaps foremost the defendants contend that the Treaty of Peace with Japan (1951) operates as a bar to the instant complaint.

Second, the defendants assert that The 1965 Japan-Korea Agreement likewise bars the claims asserted here. In accordance with this contention the defendants proffer that the Japanese Government's formal position is that the agreement by and between itself and Korea preclude the claims contained in the class complaint.

Third, the defendants assert that federal law preempts the instant action since the federal government has

[1] None of these facts are disputed. Moreover, as set forth above, a JOP concedes the truth of the allegations recited.

occupied the entire field of resolution of war related crimes and claims. In conjunction with this argument the defendants likewise assert that the controversy presented by the Jeong complaint involves a political question and therefore constitutes a non-justiciable issue. Finally, along with this argument the defendants contend that the claims presented before this Court impermissibly challenge the authority behind the various branches of government and pose a threat to U. S. foreign relations.

Court's Ruling

At the outset, it is important to note the following: (1) At the time of the events in question Mr. Jeong was a Korean citizen. (2) Mr. Jeong later became a U.S. citizen.[2] (3) The instant action is brought pursuant to CCP § 354.6. (4) The defendants do not dispute that plaintiff has properly pled the claims per § 354.6; end that § 354.6 permits the claims sought.[3]

The 1951 Treaty Of Peace

The Constitution unequivocally establishes that treaties made "under the authority of the United States, shall be the supreme law of the land . . . anything in the Constitution or ***Laws of any State*** to the Contrary notwithstanding." U.S. Const., art. VI; **see *Missouri v. Holland*** (1920) 252 U.S. 416, 432-34. The 1951 Treaty,

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[2] Mr. Jeong became a U. S. Citizen in 1997.

[3] However, the defendants do assert that the California statute in question is unconstitutional. This is not at issue in the instant motion although defendants indicated that they may raise the issue at a later time.

defendants contend, is thus part of the ***"supreme law"*** of the United States and if enforced by this Court operates to bar the Jeong action.

In analyzing the Treaty the Court must first look to the plain language of the Treaty. **See *Chan v. Korean Air Lines, Ltd.*** (1989) 490 U.S. 122, 134 ("where the text is clear, as here, we have no power to insert an amendment"); ***The Amiable Isabelle*** (1821) 19 U.S. 1, 71 ("this Court does not possess any treaty-making power. That power belongs by the Constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or grand, important or trivial, would be on our part a usurpation of power, and not an exercise of judicial function"); ***Victoria Sales Corp. v. Emery Air Freight, Inc.*** (2nd Cir. 1990) 917 F.2d 705, 707 ("when the text of a treaty is clear, a court shall not, through interpretation, alter or amend the treaty").

In light of the above, it must also follow that a treaty entered into by the United States ***only affects United States nationals at the time the treaty is signed.*** See ***Haven v. Polska*** (7th Cir. 2000) 215 F. 3d 727, 733. Here, it is undisputed that Mr. Jeong was not a United States national **at the time** the United States entered into the treaty. Hence, the defendants cannot claim that Mr. Jeong waived his claims by virtue of his United States citizenship. Additionally, the system of reparation payments and a waiver under Article 14(b) of the 1951 Treaty ***applied to allied POWs only.***

Defendants cite article 4(a) of the ***1951 U.S. – Japan Treaty*** as support for their theory that the claims asserted in the complaint have been waived. During the course of

oral argument on this point the defendants took the position that the 1951 Treaty of Peace with Japan was a fully integrated document that likewise covered all claims of Korean nationals including the subsequent 1965 Japan-Korea Agreement. This position, simply put, makes no sense and is contrary to the express language of article 4(a) which states that disputed issues by and between Japan and Korea ***"shall be the subject of special arrangements"***. This language does nothing more than allow Japan and Korea to resolve their disputes through separate agreements. Article 4(a) does not mandate any *substantive* terms for such agreements or, as Defendants suggest, "remove war-related claims . . . from U.S. judicial review and/or intervention" ***Even the U.S. State Department has conceded that the 1951 Treaty "did not extinguish claims of nationals of countries not party to the Treaty."*** Statement of Interest of the United States of America, filed in ***In re World War II Era Japanese Forced Labor Litigation,*** MDL NO. 1347 regarding non-allied prisoner of war claims. (December 13, 2001) at page 9 (hereinafter Statement of Interest) In short, article 4(a) does nothing at all to regulate the claims of Korean nationals. Clearly claims such as the ones set forth in the Jeong complaint are not barred by the very language of the treaty itself.

Specifically, Korea was not a signatory to the 1951 treaty. Therefore, even if article 4(a) had mandated certain types of remedies, it would have obligated only Japan, not Korea, to accept those terms. Indeed, article 4(a) can only be read as intending to benefit Korea (and other territories formerly occupied by Japan) by ensuring that Japan entered into negotiations to resolve outstanding disputes with those countries if those countries so sought. **See *Sale***

v. Haitian Ctrs. Council, Inc. (1993) 509 U.S. 177, 179-80 (reasonably construing text of treaty to avoid anomalous results). Even the obligation of Japan (per article 26) to provide the "same or substantially the same terms" to non-signatory countries as to the Allied Forces ***expired after three years.***

As the State Department noted, the waiver of all "Allied claims" in the 1951 treaty ***"does not cover the PRC, Taiwan, or North or South Korea,"*** Statement of Interest at 6; (nor does the State Department claim that the Korea-Japan agreement waives these claims. See *id.* at 8-9.) See also ***In re World War II Era Japanese Forced Labor Lit.*** (N.D. 2000) 114 F. Supp. 2d 939, 942. ("Since plaintiffs are not citizens of countries that are signatories of the 1951 Treaty, their claims raise a host of issues not presented by the Allied POW cases and, therefore, require further consideration in further proceedings").

Although the State Department's position on the Treaty is entitled to some deference, it is the courts, not the executive branch, that ultimately determine a treaty's meaning. See ***Sullivan v. Kidd*** (1921) 254 U.S. 433, 442; ***Kolovrat v. Oregon*** (1961) 366 U.S. 187, 194. Moreover, even the State Department, while describing in great detail the "purposes and objectives" of the 1951 Treaty, was forced to concede that the treaty "did not extinguish claims of nationals of countries not party to the Treaty." See Statement of Interest at 6. Although it states that the U.S. "facilitated and encouraged Japan's efforts to enter into . . . agreements with non-signatory nations," (see *id.*), it never states that the 1951 Treaty created **direct obligations** on non-signatories.

In light of the above, this Court must conclude that the 1951 Treaty did not and does not bar the claims set forth in the Jeong complaint.

The 1965 Japan-Korea Agreement

The Japan-Korea Agreement is an accord that has been concluded by and between two foreign nationals. The United States is not and was not a party to or signatory to that document. ***Accordingly, this document is a provision of foreign law only.*** It is not a "treaty made . . . under the Authority of the United States," U.S. Const. art. VI, cl. 2, it cannot preempt state law under the Supremacy Clause. ***United States Olympic Committee v. Interlicense Corp., S.A.*** (2nd Cir. 1984) 737 F.2d 263, 268 (rejecting argument that an international treaty which the United States had not signed and constitutionally ratified can create preemption; absent such ratification, the "clear and unambiguous congressional statutory command" required for preemption cannot be found).

Hence, the issue for this Court to decide, with respect to the 1965 Japan-Korea Agreement, is whether there has been a waiver or bar to the claims rather than preemption per the U.S. Supremacy Clause.

When both parties to a treaty agree on an interpretation, a court can defer to that interpretation, absent strong contrary evidence. See ***Hunt Inc. v. Shipwrecked Vessel*** (4th Cir. 2000) 221 F.3d. 634, 642. However, that is not the situation here. In fact, this Court is faced with the exact opposite situation. The declarations submitted by each side reveal polarity in interpretation. In this situation, the Court can ascertain foreign law by the taking of judicial

notice. See Evid. Code § 452(f). The Court can consider "any source of pertinent information, including the advice of persons learned in the subject matter." Evid. Code § 454; see also ***Volkswagenwerk A.G. v. Superior Court (Thomsen)*** (1982) 123 Cal. App. 3d 840, 852 (ascertaining German law and treaties to determine country's discovery procedures).[4]

This Court has before it competing declarations that each achieve opposite conclusions. For example, in one attached declaration, Pltf's Exh. C, Professor Chang Rok Kim, a professor of international law at Pusan University in Pusan, Korea, concludes as follows:

a. The negotiating history of the treaty, as well as explanatory materials published by the Japanese government immediately following the conclusion of the treaty, make clear that the parties did not settle individual claims; in fact, the Japanese delegate to the treaty negotiations explicitly acknowledged that if claims for damages arose in the future, Japan would pay for them. (Prof. Kim Decl. ¶¶ 11-15).

b. Any waiver in the 1965 Agreement extended only to government to government claims and did not affect individual claims or the rights of individuals to bring lawsuits. (Id.

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[4] The defendants assert that this Court should not look to outside sources to determine foreign law. Rather the defendants vigorously argue that the 1965 Agreement requires this Court to find a bar to the instant claims on the grounds that said Accord is and was fully integrated by reference into the 1951 Treaty of Peace. **This Court finds absolutely no support for such a contention and finds such an argument disingenuous at best.**

> ¶¶ 15-22). This restricted the rights of Japan and Korea to make claims on behalf of their nationals (called "diplomatic protection") but not the rights of those nationals to make claims on their behalf in court. Id. at ¶¶ 16-22; 30- 31.

Furthermore, the plaintiff submits an additional declaration to bolster the contention that the Japan-Korea Agreement did not create a waiver of the claims as asserted herein. According to the declaration submitted by Professor Kohki Abe, professor of international law at Kanagawa University in Yokohama, Japan, whose declaration was submitted to the federal district court in the Multi-District Litigation proceedings in Northern California: "The fifth to the 'eight items' [of the Agreement] – 'compensation to Korean conscripts' – is a specific reference to amounts of withheld wages that Japan then held in the Bank of Japan; it refers to a claim for specific, then-existing property, not all claims for damages that Korean forced laborers may have had against their Japanese 'employers.'"[5] *Id.* ¶ 3(6).

Naturally, the defendants submit a counter declaration which takes an opposite view of the Agreement. In this regard, the Court notes that Professor Iwasawa, an expert on Japanese law and Japanese war compensation issues, unequivocally states that the 1965 Japan-Korea Agreement has extinguished claims of Korean nationals against Japan and Japanese nationals. Professor Iwasawa supports this conclusion as follows:

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[5] During the negotiations of the Japan-Korea Agreement, Korea submitted the so-called "eight items" to Japan. The Eight Items enumerated Korea's claims against Japan.

c. The 1951 Peace Treaty sets out the framework for resolution of issues between Japan and Korea, which was achieved in the Japan-Korea Agreement. (Iwasawa Decl., ¶3).

d. The Japan-Korea Agreement implemented Article 4(a) of the 1951 Peace Treaty, settling "completely and finally" all problems concerning property, rights, and interests of the two countries and their nationals and all "claims" between the two countries and their nationals. (Iwasawa Decl., ¶4)

e. The Korean governments position that the Agreement permanently extinguished claims by individuals such as Mr. Jeong was confirmed by its 1965 official publication, The Explanation of the Treaty and Agreements Between the Republic of Korea and Japan, which states "all kinds of claims of Koreans against the Japanese Government and Japanese nationals, such as . . . receivables, compensation, and pensions of conscripted Koreans, have all been completely and finally extinguished.[. . .] [A]ll property and claims of the two countries which existed prior to the termination of the war are nullified." (Iwasawa Decl., ¶ 7(d)).[6]

In light of the above, there is no question that the parties to the Agreement do not agree on the correct interpretation of the Agreement itself. Professor Kim discusses both Korea's and Japan's position on the Agreement, offers evidence and opines that the Agreement was

[6] The government of Korea takes no such position as to the instant case. In fact, the government of Korea has been silent in this regard as to this action.

not intended to cover claims for damages such as Mr. Jeong's but rather only claims for diplomatic protection. He also notes that the term "claims" was never settled by the two countries.

Defendants' expert takes the view that under Japanese law, plaintiffs claims are barred because the minutes of the Agreement and the negotiations leading up to the Agreement reflect that claims of conscripted Koreans were fully resolved by the agreement itself.[7]

However, as pointed out by plaintiffs counsel during oral argument, even defendants' own exhibits confirm that claims such as Mr. Jeong's were not provided for in the 1965 Agreement.

For example, the article submitted by Professor In Sup Chung entitled *A Study on the Scope of the Agreement on the Settlement of Problem Concerning Property and Claims and the Economic Cooperation between the Republic of Korea and Japan,* 1965 25 Sung Kok Ronchong (1994) (Dfts ex. 2 to the declaration of Professor Yuji Iwasawa) provides at pages 6-7 that "laws regarding civil claims against Japan limited the scope of compensation to the deceased and only if the deceased was confirmed by

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[7] The plaintiff rebuts these assertions with further references to other commentators who have noted that *because Korea and Japan were never at war with each other,* the 1965 Agreement could not have been an agreement regarding war reparations to cover claims like Plaintiffs. Concluded 20 years after the end of World War II, the Agreement involved the resolution of property-related disputes left over from Japan's colonization of Korea "so that the two countries could normalize their economic relations Tong Yu, *Reparations for Former Comfort Women of World War II,* 36 Harv. Intl L.J. 528, 535 (1995) (citing Won-Soon Park, A *Study of the Nature of the Issue of Military Sexual Slavery by Japan and Its Solutions* 10-11 (Apr. 1994))

the Japanese record, many of the deceased as well as wounded Korean nationals were left without any compensation." At page 9 of the article the author recognizes in accordance with principles of international law, that the 1951 treaty imposes no obligation on Korea as a non-signatory to the 1951 treaty.

The article concludes with the premise that both the Korean and Japanese governments agreed that the claims referenced in the eight items (of the 1965 Agreement) did not include claims of a punitive nature such as **reparations**. *Id.* at pp. 10-11.

Importantly, the article also discusses Japan's position on the issue of waiver of claims at pages 16-18 and acknowledges that Japan's position has always been that the only waiver that occurred in the 1965 agreement was the waiver of diplomatic protection. This position was expressed by the Minister of Foreign affairs to the Japanese Diet in November of 1965.

Accordingly, in light of the above, the Court is unable to determine what is the correct interpretation. When a court is unable to determine what is the law of a foreign nation, the court may either apply California law or dismiss the action without prejudice. Evid. Code §311. This Court declines to dismiss the action. The law in California per CCP § 354.6 is that plaintiffs claims may proceed. Hence, in light of the above, this Court concludes that there has been no waiver or bar to the claims presented.

Federal Preemption
(Express and Implied)

Analysis of federal preemption "starts with the basic assumption that Congress did not intend to displace state law." ***Building & Constr. Trades Council v. Associated Builders & Contractors*** (1993) 507 U.S. 218, 224. State law is not preempted "unless that was the clear and manifest purpose of Congress." ***Medtronic Inc. v. Lohr*** (1996) 518 U.S. 470, 485. "Congress may impose its will on the States" but "[it] is a power we must assume Congress does not exercise lightly" ***County of Los Angeles v. Smith*** (1999) 74 Cal.App.4th 500, 506. There is no "federal policy against States imposing liability in addition to that imposed by federal law. Ordinarily state causes of action are not preempted solely because they impose liability over and above that authorized by federal law. . . . " ***California v. ARC America Corp.*** (1989) 490 U.S. 93, 105. "[B]ecause the states are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt state-law causes of action" ***Medtronic,*** 518 U.S. at 485.

Preemption may either be express or implied. ***Metropolitan Life Ins. Co. v. Massachusetts*** (1985) 471 U.S. 724, 738. Express preemption analysis is appropriate where "Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue" Express preemption requires an express and unambiguous declaration that Congress is prohibiting state legislatures, regulation or court action in a specified field. ***Cipollone v. Liggett Group*** (1992) 505 U.S. 504, 517. Implied preemption, on the other hand, occurs where the legislation does not expressly supercede [sic] state law, but 1) "Congress

intended federal law to occupy the field exclusively"; or 2) "state law is in actual conflict with federal law." ***Freightliner Corp. v. Myrick*** (1995) 514 U.S. 280, 287.

In the instant case this Court finds that there has been no declaration by Congress precluding such claims by foreign nationals. The 1951 Treaty by and between the U.S. and Japan makes very clear that it does not cover claims by foreign nationals and that Korea and Japan ***should make "special arrangements" to resolve their disputes.*** There is no language expressing an intent to preempt state law in this area.[8]

Additionally, this Court must likewise conclude that there does not exist any basis for implied preemption to preclude plaintiffs claims. With respect to implied preemption the defendants once again take the position that the 1951 Peace Treaty demonstrates an intent on the part of the U.S. government to occupy the entire field of war claims against Japan and its nationals. As has already been set forth above, the ***Treaty*** only applies to U.S. nationals (who were nationals at the time that the ***Treaty*** was made.) ***Mr. Jeong does not fit into the category specified in the Treaty.***

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[8] Defendants dispute this conclusion and cite to a Statement of Interest issued by the U.S. State Department and filed in August of 2000 which discusses a full resolution of claims by and between the U.S. and Japan. However, the Statement of Interest referenced by the defendants is relevant only to Allied Prisoner of War claims. Defendants do not cite from the December 6, 2000 Statement of Interest which addressed claims of non-Allied Prisoners of War and unequivocally states that claims such as Mr. Jeong's (a Korean national at the time the 1951 Treaty was signed) were not extinguished by the 1951 Treaty. See Statement of interest at 9.

At the time of negotiating and signing the 1951 Treaty, Congress was well aware that it did not and could not regulate claims of foreign nationals against the companies that had forced them to work without wages, nor did Congress prospectively prevent claims of future United States citizens. Any assertion or contention to the contrary has no support. Rather, the opposite notion is expressly supported since Congress left room for supplementation of the reparations scheme vis a vis the references contained in the 1951 Treaty that Japan and Korea make ***special arrangements*** by and between themselves. ***For that reason, the Court here cannot find that Congress' manifested intent was to completely occupy the entire field of war claims against Japan and its nationals.***

Notwithstanding the arguments proffered above, the defendants argue as a further contention that even though there is no specific federal treaty or statute preempting the California statute (CCP § 354.6), said statute is nevertheless preempted because it ***"disturbs foreign relations"*** under ***Zschernig v. Miller*** (1968) 389 U.S. 429 and ***National Foreign Trade Council v. Natsois*** (1st Cir. 1999) 181 F.3d 38. However, the defendants neglect the opinion issued by the Ninth Circuit in ***Gerling Global Insurance Corp. of America v. Low*** (9th Cir. 2001) 240 F. 3rd 739. The court in ***Gerling Global*** recognized that the implied preemption theory first utilized by the Supreme Court in ***Zschernig*** "is rarely invoked by the courts [and] the Supreme Court has not applied it in more than 30 years." *Id.* Moreover, to the extent that ***Zschernig*** retained any validity, a point which is open to question, it should be applied *sparingly* ***and*** *with hesitation.* See *id.* at 753. In any event, ***Zschering*** [sic] itself recognized that

more is required to invalidate a state law than the mere fact that the statute might have "some incidental or indirect effect in foreign countries." *Id.* at 752 (citing ***Zschering*** [sic] ***and Clark v. Allen*** (1947) 331 U.S. 503, 517).

The ***Gerling Global*** court rejected the argument relied upon by Defendants that courts should find statutes preempted which were likely to "provoke retaliatory action by foreign governments." The court noted that these arguments were "directed to the wrong forum." 240 F.3d at 747 (quoting ***Barclays Bank PLC v. Franchise Tax Br. of California*** (1994) 512 U.S. 298, 327 (upholding California's unitary tax reporting system against similar challenge). As in ***Gerling Global,*** no party to the civilian internee forced labor compensation cases before this Court is a foreign government or is owned, in whole or in part, by a foreign government. Rather, as in ***Gerling Global,*** the objecting parties "are, simply, businesses." *Id.* at 753. The statute is not directed at a particular foreign country. *Id.* At most, like the HVIRA (Holocaust Victims Insurance Relief Act) at issue in ***Gerling Global,*** California CCP § 354.6 targets past (World War II era) conduct that was clearly illegal prior to World War II. As in ***Gerling Global,*** "***Zschering*** [sic] does not govern." *Id.*

Moreover, the focus of the HVIRA at issue in ***Gerling Global*** is described as "Nazi Germany, its allies or sympathizers." See Ins. Code §13802. This language is virtually identical to the language of CCP § 354.6 which affords a cause of action to civilians who were forced to work without pay for "the Nazi regime, its allies and sympathizers or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies or sympathizers." As the court found in ***Gerling Global,***

CCP §354.6 "is not, on its face, directed at any particular foreign country." 240 F. 3d at 753.

The defendants also assert that if this Court were to deny the instant motion there would be an inappropriate disturbance of foreign relations between Japan and the United States. However, this argument can and should be summarily dismissed with reference to Justice Kozinski's opinion in ***Patrickson v. Dole Food Co., Inc.*** (9th Cir. 2001) 251 F.3d 795; there Justice Kozinski noted that "Federal judges, like state judges, are bound to decide cases before them according to the rule of law. If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate – up to and including passing legislation . . . But it is quite a different matter to suggest that courts – state or federal – will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Id.* at 803.

The case before this Court involves claims by private individuals against private companies doing business in or having contacts with California. These claims are authorized under California law, and no treaty has waived them.

The Political Question Doctrine Does Not Preclude the Jeong Claims

Notwithstanding the arguments set forth above the defendants make a final assertion that the Political Question Doctrine precludes this Court from proceeding with the instant case. The defendants forcefully contend that ***in every published decision*** where courts have considered the issue of WW II forced labor claims, these

cases have been dismissed as non-justiciable political questions. See ***Iwanowa v. Ford Motor Company*** (D.N.J. 1999) 67 F. Supp. 2d 424; ***Burger-Fischer v. Degussa AG*** (D.N.J. 1999) 65 F. Supp. 2d 248; ***Belk v. U.S.*** (Fed. Cir. 1988) 858 F. 2d 706; ***Frumkin v. Jones*** (D.N.J. 2001) 129 F. Supp. 2d 370; and ***In re Nazi Era Cases Against German Defendants Litigation*** (D.N.J. 2001) 129 F. Supp. 2d 370, 378.

However, it should be noted that in ***each*** of the cases cited by the defendants, compensation or reparations had been provided for in the Treaties or Agreements at issue and the courts were asked to review the adequacy of the payment or otherwise interfere with the payment of the compensation. This is not the situation in the case at bar.

Indeed, in certain of the above cases, diplomatic negotiations for reparations covering claims asserted in the respective litigation were ongoing between the German government, certain German companies and international negotiators during the pendency of the litigation. See generally Foos, Diane Richard, *Righting Past Wrongs or Interfering in International Relations? World War It-Era Slave Labor Victims Receive State Legal Standing After Fifty Years,* 31 McGeorge L. Rev. 221 (Winter 2000); Christopher, Darcie L., *Jus Cogens, Reparation Agreements, and Holocaust Slave Labor Litigation,* 31 Law & Policy in International Business (2000).

In the case at bar no prior decision of any political branch has approved of Defendants' actions, nor has any treaty negotiated and ratified by the United States addressed the claims of the Plaintiff in this case. Moreover, this Court is unaware of any ongoing negotiations addressing claims such as Mr. Jeong's. A finding by this Court –

that Plaintiff is entitled to be compensated under CCP § 354.6 due to the conduct of the Japanese companies during World War II – would not interfere with any ***legitimate*** United States governmental foreign policy interest.

Conclusion

CCP §354.6 is aimed at conduct that occurred 50 or more years ago. This Court believes that the California legislature and judiciary are not attempting to comment on the political system of any particular nation or affect U.S. relations with any particular country. The sole purpose of this Court is to enforce the law that the California legislators have placed on the books. Accordingly, the motion for judgment on the pleadings is denied. The plaintiff has properly pled the causes of action set forth in the complaint.

Dated: 9-14, 2001

PETER D. LICHTMAN

Peter D. Lichtman
Judge of the Superior Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No.: CV 99-11952-GHK (MANx) Date: May 17, 2000

Title: Jeong v. Onoda Cement Co., Ltd.

DOCKET ENTRY

PRESENT: Hon. George H. King, United States District Judge

Beatrice Herrera	None Present
Deputy Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF:	**ATTORNEYS PRESENT FOR DEFENDANT:**
None Present	None Present

PROCEEDINGS: Remand to State Court

I. Background and Procedural History

Plaintiff Jae Won Jeong,[1] a United States and California citizen who claims that he was a Korean national during World War II ("WWII"), brought his complaint in Los Angeles Superior Court on October 4, 1999. Jeong alleges that he was forced to labor without compensation at a cement plant in Korea during the war under inhumane conditions. He sues Onoda Cement Co., Ltd., the Japanese business entity that allegedly operated the plant where he was forced to work, along with

[1] Jeong purports to represent a class of plaintiffs. There has been no briefing on the issue of class certification.

several other Defendants including (1) Taiheiyo Cement Corp. ("Taiheiyo (Japan)"), a Japanese business entity that is a successor to Onoda by merger; and (2) three alleged California corporations that are subsidiaries of Taiheiyo (Japan): (a) California Portland Cement Co.; (b) Lone Star Northwest Inc.[2]; and (c) Taiheiyo Cement U.S.A.

Jeong's alleged causes of action all arise under California law. He brings claims for: (1) compensation under Cal. Code Civ. Pro. § 354.6, the recently enacted statute that purports to allow WWII forced-labor victims to sue certain business entities until 2010; (2) unjust enrichment; (3) injuries in tort; and (4) unlawful business practices under Cal. Bus. & Profs. Code § 17200 et seq.

At various points after Jeong filed his complaint, all the currently existing Defendants filed notices of removal. On November 23, 1999, we ordered the Defendants who initially removed, Taiheiyo U.S.A. and California Portland, to show cause why we should not remand this case. They filed a response to our order to show cause ("OSC"); Defendants Lone Star and Taiheiyo (Japan) also introduced new arguments for removal in their removal notices. Jeong subsequently filed a reply, which addresses Defendants' response to our OSC as well as the arguments raised in the subsequent removal notices.

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[2] In its joinder in its co-Defendants' removal notices, Taiheiyo (Japan) states that Lone Star recently changed its name to Glacier Northwest, Inc. Because all of the parties' other filings refer to this entity as Lone Star, though, we refer to it as such in this Order.

II. Discussion

A. Lack of Diversity

As the parties seeking to invoke our diversity jurisdiction, Defendants have the burden to establish jurisdictional facts such as the citizenship of the parties. *See Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992); *Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987); *Schroeder v. TWA*, 702 F.2d 189, 191 (9th Cir. 1983); 1 Schwarzer, Tashima & Wagstaffe, Federal Civil Procedure Before Trial §§ 2:656, 2:658, 2:1093 at 2D-23 to 24, 2D-213 (1999).

Here, Defendants do not dispute that Taiheiyo U.S.A. and California Portland are, like Jeong, citizens of California.[3] Nonetheless, they argue that we should look beyond their California citizenship and find that complete diversity exists in this case.

1. Alter ego theory

"'[I]n a suit involving a subsidiary corporation, the court looks to the state of incorporation and principal place of business of the subsidiary, and not to its parent.'" *Danjaq, S.A. v. Pathe Comms. Corp.*, 979 F.2d 772, 775 (9th Cir. 1992), quoting 1 Moore, Moore's Federal Practice ¶ 0.77[2.-5] (2d ed. 1992).

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[3] The parties disagree about whether Defendant Lone Star is a California corporation or a Washington corporation. This dispute does not affect our conclusion that complete diversity is lacking in this case due to the undisputed California citizenship of Taiheiyo U.S.A. and California Portland.

The only exception to this rule occurs "where the subsidiary is the alter ego of the parent corporation." *Id.* If the subsidiary is merely the alter ego of the parent, we look to the two corporations' combined business activities to determine where we should locate their citizenship for diversity purposes. *See id.*; 13B Wright, Miller & Kane § 3625 at 636 (1990). In this case, Taiheiyo (Japan) allegedly had 1999 sales of $2.5 billion. Lone Star Removal Notice 9:12; *see also* Compl. ¶ 26 (alleging that Taiheiyo (Japan) had "consolidated net sales of 609.7 billion Japanese Yen [about $5.6 billion] as of March 31, 1999"). By contrast, Lone Star states that the 1998 net sales of the California Defendants were about $535 million. Lone Star Removal Notice 11:16 n.8. So if we were to look at the companies' combined business activities to determine citizenship, we might conclude that the "California Defendants" should be treated as citizens of Japan.

But we do not reach any analysis of Defendants' combined business activities because there is not enough evidence that the California Defendants should be treated as alter egos of Taiheiyo (Japan). Whether a subsidiary is merely the alter ego of its parent is a question of fact. It turns on considerations such as the degree of control exercised by the parent, the relationship of the two corporations' activities, the membership of the board of directors, and the maintenance of separate corporate books. 13B Wright, Miller & Kane § 3625 at 636.

Here, Jeong alleges in his complaint that all the Defendants are alter egos of each other. He asserts that "[t]here exists a unity of interest between all the defendants such that any individuality and separateness between these entities have ceased, and all the defendants are alter ego of each other entities [sic] or subsidiaries

owned wholly or in majority by the defendants. Adherence to the fiction of the separate existence between these defendants would promote injustice under the circumstances of this case." Compl. ¶ 41. Aside from this broad assertion, however, Jeong's complaint includes no factual allegations of an alter-ego relationship between Taiheiyo (Japan) and the California Defendants. By itself, Jeong's conclusory allegation of an alter-ego relationship is not enough to establish that we should treat the California Defendants as citizens of Japan.

For its part, Lone Star makes a rather half-hearted attempt to argue that Taiheiyo U.S.A. and California Portland are, as Jeong so vaguely alleges in his complaint, alter egos of Taiheiyo (Japan). But Lone Star introduces no evidence showing that the California Defendants are in fact alter egos of Taiheiyo (Japan). It merely asserts that we should treat them as alter egos because they are "sued as" such in Jeong's complaint. Lone Star Removal Notice 11:12. But we cannot ignore the corporate form just because a conclusory statement in the complaint suggests that we might. *See Danjaq*, 979 F.2d at 775 ("Absent a *showing* that the subsidiary is merely an alter ego of its parent corporation, there is no justification for ignoring the separate corporate structures and looking to the subsidiary's activities to determine the parent's principal place of business. . . . We therefore hold that the citizenship of a parent is distinct from its subsidiary where, as here, there is no *evidence* of an alter ego relationship.") (emphasis added). Lone Star does not allege, let alone prove, any of the actual facts needed to show that any of the California Defendants is the alter ego of Taiheiyo (Japan), such as control exercised by Taiheiyo (Japan), a

close relationship between the corporations' activities, shared directors, and unified corporate books.

Therefore, Defendants have not carried their burden to show that we should treat the California Defendants as citizens of Japan for diversity purposes.

2. Fraudulent joinder

In a sense, Defendants' fraudulent joinder argument is the flip side of the alter ego argument discussed above. Defendants contend that Jeong has no real claim against any of the California Defendants because none of these Defendants had anything to do with inflicting his alleged injuries in WWII, and Jeong will be unable to hold them liable for Onoda's acts on the basis of successor or alter ego liability. Jeong counters by arguing that California courts might apply the "reverse veil piercing" doctrine of alter ego liability to hold the California Defendants liable for Onoda's alleged acts during WWII, perhaps on the ground that the California Defendants were acquired and maintained by their Japanese parent with funds garnered partly through the use of Jeong's labor.

Since Defendants' argument here is essentially the opposite of the alter ego argument that we just rejected, we might expect it to succeed. After all, if we determine that there is no evidence that the California Defendants are alter egos of Taiheiyo (Japan), then we might conclude that Jeong will be unable to recover from the California Defendants on the basis of the reverse veil piercing theory, and that the California Defendants are therefore fraudulently joined.

But Defendants' fraudulent joinder argument fails because there is a different standard of proof involved. A party invoking fraudulent joinder to establish diversity bears a heavy burden. "'The removing party must prove that there is absolutely no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts.'" *Davis v. Prentiss Properties Ltd., Inc.* 66 F. Supp.2d 1112, 1113 (C.D. Cal. 1999), quoting *Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983). The plaintiff's failure to state a cause of action against a resident defendant must be "'obvious according to the settled rules of the state.'" *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998), quoting *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987).

Thus, the issue here is whether it is settled law in California that an American subsidiary of a foreign corporation cannot be held liable pursuant to Cal. Code Civ. Pro. § 354.6 for the alleged use of forced labor by its parent during WWII.

The doctrine of reverse veil piercing has been used to hold a corporation liable either for the debts of a shareholder or the debts of a subsidiary. *See Towe Antique Ford Found. v. IRS*, 999 F.2d 1387, 1391-92 (9th Cir. 1993) (holding that under Montana law, reverse piercing doctrine would allow IRS to reach assets of corporation to recover on debts of shareholder who was the corporation's alter ego); *Securities Investor Prot. Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 319-23 (Bankr. S.D.N.Y. 1995) (applying New York law to hold subsidiary liable for parent's debts under reverse piercing doctrine).

Lone Star acknowledges, in a backhand way, that no reported California decision has taken up the issue of reverse veil piercing. *See* Lone Star Removal Notice 10:14-15.

It appears unlikely that this case would fulfill the elements generally required for reverse piercing at common law, as set forth by the courts that have adopted the theory. In *Securities Investor*, for example, the bankruptcy court stated that courts examining reverse piercing have looked for "a control relationship between the parent and the subsidiary." *Securities Investor*, 234 B.R. at 323. The factors involved in traditional veil piercing – such as interlocking directorates, inadequate capitalization, and common office space – come into play, and the court should consider whether the parent corporation is a mere shell that depends on their subsidiary's business operations to function. *See id.*

Here, aside from his conclusory allegation that "all the defendants are alter ego[s] of each other," Compl. ¶ 41, Jeong pleads no facts showing that any of the California Defendants have any control over Taiheiyo (Japan). Although it does not produce evidence, Lone Star states that none of the California Defendants control or have any ownership interest in Taiheiyo (Japan) and that Taiheiyo (Japan) is not undercapitalized. Lone Star Removal Notice 10:23-11:3. Indeed, there does not appear to be any reason to suspect that the California Defendants have anything but a run-of-the-mill subsidiary relationship with their parent, Taiheiyo (Japan).[4]

[4] There also appears to be no reason to conclude that the California Defendants would be considered successors in interest to Onoda.

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Nonetheless, we cannot conclude that it is "obvious according to the settled rules" of California that Jeong cannot hold the California Defendants liable in this case. The reason is the language and legislative history of § 354.6. The law states, in relevant part:

> Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim *from any entity or successor in interest thereof*, for whom that labor was performed, *either directly or through a subsidiary or affiliate.*

Cal. Code Civ. Pro. § 354.6(b) (emphasis added).

Taken together, the underlined phrases appear to mean that a plaintiff can recover "through a subsidiary or affiliate" of the entity, or successor thereof, that forced him to labor during the war. That is, the statute essentially

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Successor liability exists where "a corporation organizes another corporation with practically the same shareholders and directors, transfers all the assets but does not pay all the first corporation's debts, and continues to carry on the same business[.]" 9 Witkin, Summary of California Law § 19 at 532 (9th ed. 1989). There is no evidence or factual allegation that any or all of the California corporations possess all of Onoda's former assets. Jeong alleges conclusorily that each and every Defendant is "a successor in interest to Onoda Cement Co., Ltd.," Compl. ¶¶ 23, 27, 30, 32, 35, 38, 40. But Jeong's complaint also appears to acknowledge that it is Taiheiyo (Japan) that, via merger, now holds Onoda's former assets, *id.* ¶¶ 21, 24, and has 500 subsidiaries including the California Defendants, *id.* ¶ 25. In his reply, Jeong does not contest Lone Star's argument that the California Defendants would not be considered Onoda's successors, as the term is defined under California law.

creates a "reverse veil piercing" option for the plaintiff by permitting him to recover from an American subsidiary or affiliate of a foreign parent company regardless of whether the subsidiary has any control of the parent or had anything to do with the acts allegedly committed in WWII. Indeed, there is evidence that the legislature was concerned about the ability of companies that allegedly employed slave labor, and their affiliates, to profit from their relationship with California. The bill states that the state treasurer, CALPERS, and the State Teacher's Retirement System "shall monitor and report to the Legislature on investments of the state and its pension funds in companies doing business in California, and affiliates of those companies, that owe compensation to victims of slave and forced labor from 1929 to 1945." Cal. Stats. 1999 ch. 216 (S.B. 1245) § 3.

The statute's legislative history also supports a "reverse veil piercing" reading. An earlier version of the bill evidently stated that a plaintiff could bring an action against "any person or entity who received the benefit of" the plaintiff's forced labor. Committee Report for 1999 California Senate Bill No. 1245, 1999-00 Regular Session, May 11, 1999. Concerned that this was too broad, the legislature narrowed the law with the intent to permit actions "against any person or entity, or the parent or subsidiary companies of such entities, for whom the plaintiff actually performed labor." *Id.* As with the text of the law itself, this language suggests that a plaintiff may sue a subsidiary or affiliate of the firm that allegedly enslaved him.

Because the California courts apparently have not ruled on the issue of what entities are proper defendants under § 354.6, and the language and intent of the statute

suggests that subsidiaries are proper defendants, we cannot state with certainty that Jeong has no cause of action against the California Defendants. As a result, we cannot conclude that the California Defendants are fraudulently joined. Therefore, diversity is not a ground for removal.

B. Complete Preemption

Section 1441(a) of Title 28 provides that a defendant may remove to federal court a civil action "brought in a State court of which the district courts of the United States have original jurisdiction." This means that "'[o]nly state court actions that originally could have been filed in federal court may be removed to federal court by the defendant.'" *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 996 (9th Cir. 1987), quoting *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425, 2429 (1987).

Therefore, an action is removable based on federal question jurisdiction if the plaintiff's complaint, although it purports to bring a claim based on state law, is properly characterized as presenting a federal claim. *See Toumajian v. Frailey*, 135 F.3d 648, 653 (9th Cir. 1998); *Young*, 830 F.2d at 996 (quoting *Caterpillar*). Conversely, "[i]f the plaintiff could not have asserted a federal claim based on the allegations of her state law complaint, she could not have brought the case originally in federal court as required for removal jurisdiction under section 1441." *Young*, 830 F.2d at 997.

For this reason, simple preemption of a state law claim by federal law is not enough to justify removal. Rather, a case can be removed only if federal law "supplants" the plaintiff's state law claim with a federal claim.

Id. Federal law can provide a defense to a state law claim – as it may in this case – without justifying removal. *See Toumajian*, 135 F.3d at 654. This is a distinction that Defendants miss when they argue that removal jurisdiction is proper because federal foreign policy concerns should bar Jeong from obtaining any of the relief he seeks. Indeed, Defendants cite cases that had nothing to do with removal jurisdiction, but instead involved only defensive preemption. *See Olson v. General Dynamics Corp.*, 960 F.2d 1418, 1423 (9th Cir. 1991) (holding that claim was defensively preempted under ERISA); *Aldrich v. Mitsui*, No. 87-912-Civ-J-12 (M.D. Fla. 1988) (dismissing unjust enrichment claim brought by former POW on grounds that it was preempted by Treaty of Peace With Japan).

Defendants also argue that the Treaty of Peace With Japan and the War Claims Act "supplant" Jeong's state law claims because the Treaty provided for reparations to be paid by Japan and the Act provided a scheme whereby victims of forced labor could bring claims for compensation.

Defendants' argument fails because neither the Treaty nor the Act gave any forced labor victim a right to bring a suit for compensation in federal court. The Treaty provided for seizure of certain Japanese property by the Allied powers and other forms of reparation. Treaty Art. 14 §§ 1, 2(1). It also provided for the transfer of certain funds from Japan and its nationals to the International Committee of the Red Cross to be used for benefit of former prisoners of war. *Id.* Art. 16. But the Treaty provides no one with a private right of action to seek compensation in federal court for forced labor performed for a Japanese business entity.

The War Claims Act of 1948, meanwhile, set up a Commission and gave it jurisdiction to, inter alia, "receive and adjudicate" claims by civilian American citizens who were captured by the Japanese government during the war. 50 U.S.C. App. §§ 2002, 2004.[5] The Act did not provide for any claim to be brought in federal court. Indeed, the Act stated that "[t]he action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise. . . . " 50 U.S.C. App. § 2010.[6]

Defendants acknowledge that the War Claims Act made no provision for any federal court review of claims for compensation, but argue that we still have removal jurisdiction under 28 U.S.C. § 1331 because reparations claims arise under federal law. They essentially argue that we have original jurisdiction over reparations claims, even though Congress, in the only laws that Defendants point to that create any sort of reparations claim whatsoever, expressly stated that we lack any power to review such claims. Defendants' argument presumably would read a

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[5] As Jeong points out, the Act evidently did not extend to claims brought by Korean nationals, as he allegedly was at the time. This fact is not necessary to our removal jurisdiction inquiry, however, because the Act simply did not create a cause of action that could be brought in federal court for *anyone*, regardless of his or her nationality.

[6] In 1954, Congress abolished the War Claims Commission and transferred its duties to the Foreign Claims Settlement Commission, an agency within the Department of Justice. *See* 22 U.S.C. § 1622 et seq. Decisions of the Commission remained unreviewable by any court. § 1622g.

grant of district court jurisdiction into any federal statute that creates an administrative claims process, regardless of whether Congress has expressly insulated that process from judicial review. Section 1331 is not so broad: It grants district courts "original jurisdiction of all *civil actions* arising under the Constitution, laws or treaties of the United States" (emphasis added). There is no "civil action" against alleged wrongdoers under the War Claims Act because Congress decided to create an administrative claims process instead. *See Dillon v. Combs*, 895 F.2d 1175, 1177 (7th Cir. 1990) (stating that Section 1331 does not by itself furnish a private right to enforce a federal law in federal court; "the entitlement to enforce the federal rule generally must be found within the statue in question"). Therefore, the War Claims Act provides no basis for removal.[7]

Finally, Defendants argue that Jeong's claims are completely preempted because "the right to relief under state law requires resolution of a substantial question of federal law in dispute," quoting *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust*, 463 U.S. 1,

[7] Defendants also insist that we have removal jurisdiction even though Jeong may no longer possess any remedy under federal law. It may be true that removal jurisdiction can exist even if the federal law which grants jurisdiction provides no relief to the plaintiff. *See Caterpillar*, 482 U.S. at 391 n.4; *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560-61 (1968). But Defendants' argument is a red herring. We cannot even reach the issue of whether relief might be available unless we possess jurisdiction to hear the plaintiff's claim. *See Avco*, 390 U.S. at 561 ("The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy."). Here, we have no jurisdiction to hear any federal claim against a Japanese company for compensation for forced labor during WWII. We never reach the issue of relief.

13 (1983). But *Franchise Tax Board* was discussing a situation where "some substantial, disputed question of federal law is a necessary *element* of one of the well-pleaded state claims, or that one or the other claim is 'really' one of federal law." *Id.* (emphasis added). The court distinguished the situation where federal law merely provides the defense of preemption. *Id.* at 13-14. Here, no element of Jeong's claims depends on federal law; his prima facie case for compensation based on forced labor is strictly a matter of state law. Federal law enters the picture only as a defense, because the point of contention is whether Jeong, even if he can prove all the elements of his state law claim, is still barred by preemption from obtaining any relief.

In sum, there is no complete preemption here to provide a ground for removal jurisdiction.

C. Foreign Sovereign Immunities Act (FSIA)

1. Removal Jurisdiction Over Foreign States

Under 28 U.S.C. § 1441(d), "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending." Section 1603(a), in turn, defines a "foreign state" as including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." Section 1603(b) goes on to define an "agency or instrumentality of a foreign state" as any entity that (1) "is a separate legal person, corporate or otherwise"; (2) "is an organ of a foreign state or political subdivision thereof, or

a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) "is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

The removing Defendant bears the burden of showing that it is an agent or instrumentality of a foreign state. *See Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999); *see also Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 & n.5 (6th Cir. 1988) (stating that the defendant has the burden to produce prima facie evidence that the FSIA applies and the plaintiff's claim does not fit into one of the Act's exceptions; if the defendant carries this burden, the plaintiff must produce evidence that the FSIA does not apply). To resolve the issue of jurisdiction under the FSIA, we "must look at the substance of the allegations" and review any evidence submitted by the parties, such as affidavits. *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1019 (2d Cir. 1993).

2. Defendants Have Not Shown that the FSIA Applies

In their notices of joinder in the removal, Lone Star and Taiheiyo (Japan) argue that Defendants have the right to remove because Onoda was an agent or instrumentality[8] of Japan for purposes of the FSIA and 28 U.S.C.

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[8] Defendants assert that the FSIA applies because "Onoda was controlled and directed by Japanese Government during World War II as part of Japan's effort." Lone Star Removal Notice 2:24-26. Defendants do not contend that the Japanese government had any ownership interest in Onoda, so we interpret Defendants' assertion that Japan

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§ 1441(d) at the time that the events giving rise to Jeong's claims allegedly occurred. Defendants do not contend that any of them is currently an agent or instrumentality of Japan. *See* Taiheiyo (Japan) Removal Notice 5:21-22.[9]

"controlled and directed" Onoda as an allegation that Onoda was "an organ of" Japan under the FSIA.

[9] Jeong argues that Taiheiyo (Japan)'s notice of joinder in its fellow Defendants' notice of removal was untimely, but Jeong cites no authority to support this contention, and we reject his argument.

A defendant must file its notice of removal "within thirty days after the receipt by the Defendant, through service or otherwise, of a copy of the initial pleading ... or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter." 28 U.S.C. § 1446(b).

Jeong appears to be suggesting that Taiheiyo (Japan) had an obligation to join in Lone Star's notice of removal, which Lone Star filed on December 22, 1999. This argument is foreclosed by *Murphy Bros. Inc. v. Michetti Pipe Stringing, Inc.*, 119 S. Ct. 1322, 1328-29 (1999), where the Supreme Court held that the 30-day clock in § 1446(b) does not begin to run until the defendant is served with the summons, even if the defendant received a copy of the complaint prior to service. The Court premised its holding on "a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." *Id.* at 1325. Under this principle, a defendant cannot become a true participant in the action until it is served, see *id.* at 1327, and cannot be required to join in a removal notice filed before it was served. *See also Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423, 1429 (9th Cir. 1984) ("a party not served need not be joined; the defendants summonsed can remove by themselves"), superseded on other grounds by 28 U.S.C. § 1441(e).

Here, Taiheiyo (Japan) states that it was served (allegedly defectively) on December 27, 1999. Jeong states that Taiheiyo (Japan) was served "on or about December 26, 1999," Pl.'s Reply 1:12, but this is too vague to raise a factual dispute that Taiheiyo (Japan) was served before December 27, 1999. Setting aside Taiheiyo (Japan)'s contention that service was defective and assuming for the sake of argument that service was proper, Taiheiyo (Japan) had until January 26, 2000 to file

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We assume without deciding that 28 U.S.C. § 1603 applies to an entity that was an agent or instrumentality of a foreign state at the time of its challenged conduct, but is not such an agent or instrumentality at the time of suit. *See General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-1382 (8th Cir. 1993) (holding that FSIA applied if the defendant was a foreign state at the time of its alleged wrongdoing, even if it is not at the time of suit); *Gould*, 853 F.2d at 450 (same); *Jugobanka A.D. Belgrade*, 2 F. Supp.2d 407, 414 (S.D.N.Y. 1998) (reasoning that "the correct approach under the FSIA is to ask whether the underlying conduct took place on the foreign state's watch, even if that state is no longer in control of the party by the time of the lawsuit, or, alternatively, whether the defendant [is] currently a foreign state, regardless of its status at the time of the underlying conduct"). *Cf. Straub v. A. P. Green*, 38 F.3d 448, 451 (9th Cir. 1994) (citing *General Electric Capital* and *Gould*, and suggesting in dictum that FSIA would apply to a party that was a foreign state at the time of the alleged wrongdoing). *But see Ocasek v. Flintkote Co.*, 796 F. Supp. 362, 365 (N. D. Ill. 1992) (stating that the FSIA does not apply unless an entity is a foreign state at the time of suit).

We likewise assume without deciding that Defendants might have a right to remove under 28 U.S.C. § 1441(d)

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its notice of joinder in the removal. This was in fact the day that Taiheiyo (Japan) field its notice. The fact that Jeong may not have received the notice until January 28, 2000 is irrelevant, at least as long as Taiheiyo (Japan) mailed the notice to Jeong's counsel on or before January 26, 2000. Fed.R.Civ.P. 5(b). Taiheiyo (Japan) has submitted a proof of service stating that it mailed its notice of joinder in the removal to Jeong's counsel on January 26, and Jeong does not dispute that it was in fact mailed on this date.

even though it was one of their alleged predecessors in interest, Onoda, and not any of them, that supposedly was an agency or instrumentality of Japan. *But cf. Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-62 (9th Cir. 1995) (holding that wholly owned subsidiary of an agency or instrumentality of a foreign state was not itself an agency or instrumentality of the state).

Defendants claim that the government of Japan essentially nationalized Onoda, along with many other manufacturing concerns, to further its war effort. Taiheiyo (Japan) states that on April 25, 1944, the Japanese government effectively took control of Onoda under the Munitions Company Law, which had been enacted in December, 1943. Taiheiyo (Japan) Removal Notice 3:20-4:16.

A firm subject to the provisions of the Munitions Company Law very well might be considered an organ of the Japanese government. We give broad meaning to the terms "organ" and "agency or instrumentality" in the FSIA. *See Gates*, 54 F.3d 1457, 1460 (9th Cir. 1995). In recently holding that a Japanese broadcaster, NHK, was an organ of the state under the FSIA, the Ninth Circuit observed that the district court had found that the Japanese government exerted control over NHK's programming, budget, and operations in various ways, including (1) appointing NHK's managing board; (2) giving supervision of NHK's board and budget to a government minister; (3) funding NHK through a government-mandated fee on televisions; and (4) requiring any changes to NHK's articles of incorporation to be approved by the minister. *Alpha Therapeutic*, 199 F.3d at 1084. The court also found it significant that NHK was created by law, had to broadcast for the "'public welfare'"

and meet certain government programming goals, could not earn profits, and was termed a "'designated public institution.'" *Id.*

A firm designated a Munitions Company apparently would have possessed some similar hallmarks of government control, at least as far as its "Munitions Business" was concerned. Taiheiyo (Japan) attaches to its removal notice a purported copy of the Munitions Company Law as well as an English translation; neither is authenticated by declaration. *Id.* Ex. D. The English test provided by Taiheiyo (Japan) states that a "Munitions Company," as designated by Japan's government "shall conduct its Munitions Business responsibly and perform at its maximum capacity" to assist the war effort. *Id.* Ex. D at 20. It also provides for, inter alia, the appointment of a government-approved production director at each Munitions Company to direct its Munitions Business; the conscription into national service of "production directors, production managers and others engaged in Munitions Business"; and government authority to alter the firm's articles of incorporation and fire its executives. *Id.* Ex. D at 21-23.

Whatever the effect of the Munitions Company Law may have been, however, Defendants have failed to show that they are entitled to removal under 28 U.S.C. § 1441(d) because they have not demonstrated the extent to which Onoda was subject to the Munitions Company Law at the time that it allegedly injured Jeong. Although Taiheiyo (Japan) states that the Japanese government controlled Onoda "during World War II," it concedes that the government did not designate Onoda a munitions company until "early 1944." Taiheiyo (Japan) Removal Notice 3:9, 4:12. In fact, Taiheiyo (Japan) produces an

unauthenticated Japanese document (and its alleged English translation) which purports to be a "designation order" showing that the Munitions Company Law was applied to Onoda on April 25, 1944. Taiheiyo (Japan) Removal Notice Ex. E. Moreover, it is not clear that Onoda's operations in Korea were covered by the designation order. Taiheiyo (Japan)'s English translation of the purported order states that "[t]he above-referenced entity [Onoda Cement Co., Ltd.] is hereby designated as a Munitions Company *as follows*" [emphasis added], and then lists eight specific factories engaged in "Munitions Business." *Id.* The document does not state, and Defendants do not specifically allege, that any of the listed factories were in Korea. The factory at which Jeong alleges that he labored does not appear to be on the list. *Compare id. with* Compl. ¶ 62 (alleging that Jeong was forced to work at a "camp in Chun-Nae Ri, Chun-Nae Myun, the southern part of Ham-Kyung province located Northeast of Seoul, Korea").

Indeed, another document submitted by Taiheiyo (Japan) suggests that Onoda's operations in Korea were not subjected to the Munitions Company Law until December, 1944, if at all. Taiheiyo (Japan) has provided an unauthenticated five-page excerpt of a historical account by Scon-Won Park entitled Colonial Industrialization Labor in Korea: The Onoda Cement Factory (Harvard 1999). Taiheiyo (Japan) Removal Notice Ex. F. Park writes that although "the Onoda Company was designated a war-related company" in April, 1944, it was not until December, 1944 that four factories, including the "Ch'onnaeri" factory, "were similarly designated." *Id.* at 31.

In sum, Defendants' only evidence that Onoda ever might have been an organ of Japan comes in the form of

unauthenticated exhibits – which would be inadmissible under the Federal Rules of Evidence – showing that Onoda became a Munitions Company no earlier than April, 1944, and suggesting that the factory where Jeong allegedly labored was not designated as "war-related" until December, 1944. Jeong alleges that he was sent to the labor camp in Chun-Nae Ri at the end of January, 1944. Compl. ¶ 62. Jeong's complaint does not allege when his period of forced labor for Onoda ended, and Defendants produce no evidence and make no allegations bearing on this fact. As a result, there is no indication in the record that Jeong was even still allegedly laboring for Onoda in April or December, 1944.

Without a basis for concluding that Onoda was an agent or instrumentality of Japan when it allegedly caused Jeong's injuries, we cannot assert removal jurisdiction under § 1441(d).[10] While it may seem unfair to penalize Defendants for a vagueness in Jeong's complaint, we must bear in mind that Defendants have the burden to prove jurisdictional facts.[11] We cannot

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[10] The Ninth Circuit has stated that it "has applied the FSIA to cases in which foreign governments acquired control over private entities after the conduct underlying the lawsuit has occurred." *Straub*, 38 F.3d at 451, citing *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 823 (9th Cir. 1987) and *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458, 1460 (9th Cir. 1984). But in *Straub*, *West*, and *Wolf*, the defendant entity was the agent or instrumentality of a foreign state at the time of suit. *See Straub*, 38 F.3d at 451; *West*, 807 F.2d at 823; *Wolf*, 739 F.2d at 1460 (observing that entity was nationalized during suit). As we discussed above, Defendants do not claim that any of them is currently an agency or instrumentality of Japan.

[11] Defendants make much of the fact that Jeong alleges that the factory where he labored "was operated by and for the benefit of [Onoda] under the color of the Japanese authority," that his labor "benefited the Japanese war effort," and that it was the Japanese

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confer jurisdiction on ourselves by filling in the blanks in Jeong's complaint.[12]

In their removal notices, Lone Star and Taiheiyo (Japan) describe the difficulties they have had locating witnesses to Onoda's activities during the war, as well as obtaining and translating documents from that period. *See* Lone Star Removal Notice 3:9 n.2.; Taiheiyo (Japan) Removal Notice 5:6-20. Defendants suggest that they would be able to gather more evidence of government control if given more time to do so, but they do not directly request more time to obtain such evidence before we make a decision on our removal jurisdiction.[13] Indeed, Defendants do not

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government that sent him to Onoda's plant after he refused to join Japan's military. Compl. ¶¶ 59, 62-63, 69. But the fact that the Japanese government may have encouraged, facilitated, and benefited from the use of forced labor by Onoda does not mean that the government controlled Onoda to such a degree that the firm was a government organ rather than a private entity.

[12] Even if we assumed that Jeong was allegedly laboring for Onoda from January, 1944 until the end of the war, this still would not necessarily mean that Defendants are entitled to removal under § 1441(d). Based on the allegations in Jeong's complaint and the documents submitted by Defendants, Onoda's alleged decision to enslave Jeong took place at least three months before Onoda might have become an organ of the Japanese government. Although a portion of Jeong's alleged injuries might have occurred while Onoda was nationalized, the policies behind the FSIA are attenuated if Onoda undertook to injure Jeong while it was still a private company. *See generally Jugobanka*, 2 F. Supp.2d at 413-14 (reasoning that one goal of FSIA is to channel to federal court cases that require judiciary scrutiny of a foreign sovereign's conduct). The policies behind the FSIA are further weakened by the fact that the Japanese government does not face liability in this suit. *See id.* at 413.

[13] On February 2, 2000, Defendants applied ex parte for leave to file additional briefing on the FSIA and diversity jurisdiction issues, claiming that because our OSC had addressed only the issue of complete preemption, they did not expect Jeong to try to rebut

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identify any evidence they expect to find that would show that Onoda became an agency or instrumentality of Japan earlier than April or December, 1944. They have failed to show that any significant jurisdictional facts are in dispute, such that we might afford them an opportunity to develop more evidence.

As we discussed in note 13, Defendants and their shared counsel had more than three months to gather evidence and formulate their FSIA arguments. Defendants'

Defendants' FSIA and diversity arguments in his reply to Defendants' response to our OSC. We denied Defendants' ex parte request, stating that we would order more briefing if we felt it would assist our decision.

We do not believe that further briefing would be helpful or appropriate, as the parties have filed ample briefing on all the issues at hand. Defendants Taiheiyo U.S.A. and California Portland were served on October 19, 1999 and removed on November 17, 1999, citing complete preemption as their only ground for removal. We issued our OSC on November 23, 1999. Taiheiyo U.S.A. and California Portland, after obtaining an extension of time ex parte, responded to our OSC on December 22, 1999, addressing the complete preemption issue and also raising the issue of FSIA removal jurisdiction under 28 U.S.C. § 1441(d). On the same day, Defendant Lone Star filed its joinder in the removal, accompanied by 11 pages of briefing on new grounds for removal – diversity and FSIA jurisdiction. Five weeks later, on January 26, 2000, Defendant Taiheiyo (Japan) weighed in with its own joinder in the removal, accompanied by five more pages of briefing on FSIA jurisdiction, as well as various exhibits including those we discussed above. On January 31, 2000, Jeong replied to the response to our OSC, addressing all three of Defendants' arguments for removal.

Defendants are all represented by the same counsel. Given their position that Lone Star is able to raise the FSIA ground for removal, there was no reason that Taiheiyo U.S.A. and California Portland could not have raised this ground in their initial removal notice. Thus, Defendants had several opportunities over the course of three months to brief the FSIA issue, and availed themselves of two of them. They likewise have had ample opportunity to brief the diversity issue. We do not think that our decision making would benefit from affording Defendants yet another at-bat.

difficulty in investigating FSIA's possible applicability is, perhaps, an unfortunate consequence of the California legislature's decision to attempt to revive 55-year-old claims. Over that span of years, documents naturally will be lost, witnesses will die or forget facts, and languages may even evolve to the point where translation becomes difficult. The solution to these potential problems, however, is not to relax the requirement that Defendants sustain their burden to make a prima facie showing of jurisdiction in a timely removal notice. Because Defendants have failed to make such a prima facie showing, we cannot permit them to remove under 28 U.S.C. § 1441(d).[14]

III. Disposition

We **REMAND** this case to state court.

IT IS SO ORDERED.

MINUTES FORM 11
CIVIL-GEN Initials of Deputy Clerk [Illegible]

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[14] Although Defendants have failed at this stage of the case to carry their burden to show that they should be treated as foreign states under the FSIA, this does not necessarily mean that they will be unable to assert FSIA immunity in state court should they develop the necessary evidence. *See* 28 U.S.C. § 1604 ("Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States *and of the States* except as provided in sections 1605 to 1607 of this chapter.") (emphasis added).

Court of Appeal, Second Appellate District,
Division Eight – No. B155736
S124698

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TAIHEIYO CEMENT
CORPORATION et al., Petitioners,

v.

SUPERIOR COURT
LOS ANGELES COUNTY, Respondent;

JAE WON JEONG, Real Party in Interest.

(Filed Jul. 14, 2004)

Petition for review DENIED.

GEORGE
Chief Justice

From: West's Annotated California Codes, Code of Civil Procedure (2004 Supplement)

§ 354.6 Second World War slave or forced labor victims; heirs; actions for recovery of compensation; limitations

(a) As used in this section:

(1) "Second World War slave labor victim" means any person taken from a concentration camp or ghetto or diverted from transportation to a concentration camp or from a ghetto to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(2) 'Second World War forced labor victim" means any person who was a member of the civilian population conquered by the Nazi regime, its allies or sympathizers, or prisoner-of-war of the Nazi regime, its allies or sympathizers, forced to perform labor without pay for any period of time between 1929 and 1945, by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers.

(3) "Compensation" means the present value of wages and benefits that individuals should have been paid and damages for injuries sustained in connection with the labor performed. Present value shall be calculated on the basis of the market value of the services at the time they were performed, plus interest from the time the services were performed, compounded annually

to date of full payment without diminution for wartime or postwar currency devaluation.

(b) Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate. That action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

(Added by Stats.1999, c. 216 (S.B.1245), § 4, eff. July 28, 1999.)

Historical and Statutory Notes

1999 Legislation

Sections 1 to 3 of Stats.1999, c. 216 (S.B.1245), provide:

"SECTION 1. (a) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California.

"(b) These victims of Nazi persecution have been deprived of their entitlement to compensation for their

labor and for injuries sustained while performing that labor as forced or slave laborers prior to and during the Second World War.

"(c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to claim their entitlement to compensation for forced or slave labor performed prior to and during the Second World War.

"(d) To the extent that the statute of limitations applicable to claims for compensation is extended by this act, that extension of the limitations period is intended to be applied retroactively, irrespective of whether the claims were otherwise barred by any applicable statute of limitations under any other provision of law prior to the enactment of this act.

"SEC. 2. It is the intent of the Legislature, in addition to the provisions of this act, to enact additional public policy in any other case of proven patterns of slave labor employed by firms presently doing business in California that served as the basis of ill-gotten wealth at the expense of victims who are residents of California.

"SEC. 3. The Treasurer, the Public Employees Retirement System, and the State Teacher's Retirement System shall monitor and report to the Legislature on investments of the state and its pension funds in companies doing business in California, and affiliates of those companies, that owe compensation to victims of slave and forced labor from 1929 to 1945."

TREATY OF PEACE
WITH
JAPAN

Whereas the Allied Powers and Japan are resolved that henceforth their relations shall be those of nations which, as sovereign equals, cooperate in friendly association to promote their common welfare and to maintain international peace and security, and are therefore desirous of concluding a Treaty of Peace which will settle questions still outstanding as a result of the existence of a state of war between them;

Whereas Japan for its part declares its intention to apply for membership in the United Nations and in all circumstances to conform to the principles of the charter of the United Nations; to strive to realize the objectives of the Universal Declaration of Human Rights;[1] to seek to create within Japan conditions of stability and well-being as defined in Articles 55 and 56 of the Charter of the United Nations and already initiated by post-surrender Japanese legislation; and in public and private trade and commerce to conform to internationally accepted fair practices;

Whereas the Allied Powers welcome the intentions of Japan set out in the foregoing paragraph;

The Allied Powers and Japan have therefore determined to conclude the present Treaty of Peace, and have accordingly appointed the undersigned Plenipotentiaries,

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[1] Senate doc. 123, 81st Cong., 1st sess., p. 1158.

who, after presentation of their full powers, found in good and due form, have agreed on the following provisions:

CHAPTER I

PEACE

Article 1

(a) The state of war between Japan and each of the Allied Powers is terminated as from the date on which the present Treaty comes into force between Japan and the Allied Power concerned as provided for in Article 23.

(b) The Allied Powers recognize the full sovereignty of the Japanese people over Japan and its territorial waters.

CHAPTER II

TERRITORY

Article 2

(a) Japan, recognizing the independence of Korea, renounces all right, title and claim to Korea, including the islands of Quelpart, Port Hamilton and Dagelet.

(b) Japan renounces all right, title and claim to Formosa and the Pescadores.

(c) Japan renounces all right, title and claim to the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905.

(d) Japan renounces all right, title and claim in connection with the League of Nations Mandate System, and accepts the action of the United Nations Security

Council of April 2, 1947, extending the trusteeship system to the Pacific Islands formerly under mandate to Japan.

(e) Japan renounces all claim to any right or title to or interest in connection with any part of the Antarctic area, whether deriving from the activities of Japanese nationals or otherwise.

(f) Japan renounces all right, title and claim to the Spratly Islands and to the Paracel Islands.

Article 3

Japan will concur in any proposal of the United States to the United Nations to place under its trusteeship system, with the United States as the sole administering authority, Nansei Shoto south of 29° north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano Islands) and Parace Vela and Marcus Island. Pending the making of such a proposal and affirmative action thereon, the United States will have the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands, including their territorial waters.

Article 4

(a) Subject to the provisions of paragraph (b) of this Article, the disposition of property of Japan and of its nationals in the areas referred to in Article 2, and their claims, including debts, against the authorities presently administering such areas and the residents (including juridical persons) thereof, and the disposition in Japan of property of such authorities and residents, and of claims, including debts, of such authorities and residents against

Japan and its nationals, shall be the subject of special arrangements between Japan and such authorities. The property of any of the Allied Powers or its nationals in the areas referred to in Article 2 shall, insofar as this has not already been done, be returned by the administering authority in the condition in which it now exists. (The term nationals whenever used in the present Treaty includes juridical persons.)

(b) Japan recognizes the validity of dispositions of property of Japan and Japanese nationals made by or pursuant to directives of the United States Military Government in any of the areas referred to in Articles 2 and 3.

(c) Japanese owned submarine cables connecting Japan with territory removed from Japanese control pursuant to the present Treaty shall be equally divided, Japan retaining the Japanese terminal and adjoining half of the cable, and the detached territory the remainder of the cable and connecting terminal facilities.

CHAPTER III

SECURITY

Article 5

(a) Japan accepts the obligations set forth in Article 2 of the Charter of the United Nations, and in particular the obligations

(i) to settle its international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(ii) to refrain in its international relations from the threat or use of force against the territorial integrity or

political independence of any State or in any other manner inconsistent with the Purposes of the United Nations;

(iii) to give the United Nations every assistance in any action it takes in accordance with the Charter and to refrain from giving assistance to any State against which the United Nations may take preventive or enforcement action.

(b) The Allied Powers confirm that they will be guided by the principles of Article 2 of the Charter of the United Nations in their relations with Japan.

(c) The Allied Powers for their part recognize that Japan as a sovereign nation possesses the inherent right of individual or collective self-defense referred to in Article 51 of the Charter of the United Nations and that Japan may voluntarily enter into collective security arrangements.

Article 6

(a) All occupation forces of the Allied Powers shall be withdrawn from Japan as soon as possible after the coming into force of the present Treaty, and in any case not later than 90 days thereafter. Nothing in this provision shall, however, prevent the stationing or retention of foreign armed forces in Japanese territory under or in consequence of any bilateral or multilateral agreements which have been or may be made between one or more of the Allied Powers, on the one hand, and Japan on the other.

(b) The provisions of Article 9 of the Potsdam Proclamation of July 25, 1945,[1] dealing with the return of

[1] Senate doc. 123, 81st Cong., 1st Sess., p. 49.

Japanese military forces to their homes, to the extent not already completed, will be carried out.

(c) All Japanese property for which compensation has not already been paid, which was supplied for the use of the occupation forces and which remains in the possession of those forces at the time of the coming into force of the present Treaty, shall be returned to the Japanese Government within the same 90 days unless other arrangements are made by mutual agreement.

CHAPTER IV

POLITICAL AND ECONOMIC CLAUSES

Article 7

(a) Each of the Allied Powers, within one year after the present Treaty has come into force between it and Japan, will notify Japan which of its prewar bilateral treaties or conventions with Japan it wishes to continue in force or revive, and any treatise or conventions so notified shall continue in force or be revived subject only to such amendments as may be necessary to ensure conformity with the present Treaty. The treaties and conventions so notified shall be considered as having been continued in force or revived three months after the date of notification and shall be registered with the Secretariat of the United Nations. All such treaties and conventions as to which Japan is not so notified shall be regarded as abrogated.

(b) Any notification made under paragraph (a) of this Article may except from the operation or revival of a treaty or convention any territory for the international relations of which the notifying Power is responsible, until three months after the date on which notice is given to Japan that such exception shall cease to apply.

Article 8

(a) Japan will recognize the full force of all treaties now or hereafter concluded by the Allied Powers for terminating the state of war initiated on September 1, 1939, as well as any other arrangements by the Allied Powers for or in connection with the restoration of peace. Japan also accepts the arrangements made for terminating the former League of Nations and Permanent Court of International Justice.

(b) Japan renounces all such rights and interests as it may derive from being a signatory power of the conventions of St. Germain-en-Laye of September 10, 1919, and the Straits Agreement of Montreux of July 20, 1936, and from Article 16 or the Treaty of Peace with Turkey signed at Lausanne on July 24, 1923.

(c) Japan renounces all rights, title and interests acquired under, and is discharged from all obligations resulting from, the Agreement between Germany and the Creditor Powers of January 20, 1930, and its Annexes, including the Trust Agreement, dated May 17, 1930; the Convention of January 20, 1930, respecting the Bank for International Settlement; and the Statutes of the Bank for International Settlements. Japan will notify to the Ministry of Foreign Affairs in Paris within six months of the first coming into force of the present Treaty is renunciation of the rights, title and interests referred to in this paragraph.

Article 9

Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation

or limitation of fishing and the conservation and development of fisheries on the high seas.

Article 10

Japan renounces all special rights and interests in China, including all benefits and privileges resulting from the provisions of the final Protocol signed at Peking on September 7, 1901,[1] and all annexes, notes and documents supplementary thereto, and agrees to the abrogation in respect to Japan of the said protocol, annexes, notes and documents.

Article 11

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan. The power to grant clemency, to reduce sentences and to parole with respect to such prisoners may not be exercised except on the decision of the government or Governments which imposed the sentence in each instance, and on the recommendation of Japan. In the case of persons sentenced by the International Military Tribunal for the Far East, such power may not be exercised except on the decision of a majority of the Governments represented on the Tribunal, and on the recommendation of Japan.

Article 12

(a) Japan declares its readiness promptly to enter into negotiations for the conclusion with each of the Allied

[1] Treaty Series 397.

Powers of treaties or agreements to place their trading, maritime and other commercial relations on a stable and friendly basis.

(b) Pending the conclusion of the relevant treaty or agreement, Japan will, during a period of four years from the first coming into force of the present Treaty

(1) accord to each of the Allied Powers, its nationals, products and vessels

(i) most-favored-nation treatment with respect to customs duties, charges, restrictions and other regulations on or in connection with the importation and exportation of goods;

(ii) national treatment with respect to shipping, navigation and imported goods, and with respect to natural and juridical persons and their interests – such treatment to include all matters pertaining to the levying and collection of taxes, access to the courts, the making and performance of contracts, rights to property (tangible and intangible), participation in juridical entities constituted under Japanese law, and generally the conduct of all kinds of business and professional activities;

(2) ensure that external purchases and sales of Japanese state trading enterprises shall be based solely on commercial considerations.

(c) In respect to any matter, however, Japan shall be obliged to accord to an Allied Power national treatment, or most-favored-nation treatment, only to the extent that the

Allied Power concerned accords Japan national treatment or most-favored-nation treatment, as the case may be, in respect of the same matter. The reciprocity envisaged in the foregoing sentence shall be determined, in the case of products, vessels and juridical entities of, and persons domiciled in, any non-metropolitan territory of an Allied Power, and in the case of juridical entities of, and persons domiciled in, any state or province of an Allied Power having a federal government, by reference to the treatment accorded to Japan in such territory, state or province.

(d) In the application of this Article, a discriminatory measure shall not be considered to derogate from the grant of national or most-favored-nation treatment, as the case may be, if such measure is based on an exception customarily provided for in the commercial treaties of the party applying it, or on the need to safeguard that party's external financial position or balance of payments (except in respect to shipping and navigation), or on the need to maintain its essential security interests, and provided such measure is proportionate to the circumstances and not applied in an arbitrary or unreasonable manner.

(e) Japan's obligations under this Article shall not be affected by the exercise of any Allied rights under Article 14 of the present Treaty; nor shall the provisions of this Article be understood as limiting the undertakings assumed by Japan by virtue of Article 15 of the Treaty.

Article 13

(a) Japan will enter into negotiations with any of the Allied Powers, promptly upon the request of such Power or Powers, for the conclusion of bilateral or multilateral agreements relating to international civil air transport.

(b) Pending the conclusion of such agreement or agreements, Japan will, during a period of four years from the first coming into force of the present Treaty, extend to such Power treatment not less favorable with respect to air-traffic rights and privileges than those exercised by any such Powers at the date of such coming into force, and will accord complete equality of opportunity in respect to the operation and development of air services.

(c) Pending its becoming a party to the Convention on International Civil Aviation in accordance with Article 93 thereof, Japan will give effect to the provisions of that Convention applicable to the international navigation of aircraft, and will give effect to the standards, practices and procedures adopted as annexes to the Convention in accordance with the terms of the Convention.

CHAPTER V

CLAIMS AND PROPERTY

Article 14

(a) It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations.

Therefore,

1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the

cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and, where the manufacturing of raw materials is called for, they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan.

2. (I) Subject to the provisions of sub-paragraph (II) below, each of the Allied Powers shall have the right to seize, retain, liquidate or otherwise dispose of all property, rights and interests of

(a) Japan and Japanese nationals,

(b) persons acting for or on behalf of Japan or Japanese nationals, and

(c) entities owned or controlled by Japan or Japanese nationals, which on the first coming into force of the present Treaty were subject to its jurisdiction. The property, rights and interests specified in this sub-paragraph shall include those now blocked, vested or in the possession or under the control of enemy property authorities of Allied Powers, which belonged to, or were held or managed on behalf of, any of the persons or entities mentioned in (a), (b) or (c) above at the time such assets came under the controls of such authorities.

(II) the following shall be excepted from the right specified in subparagraph (I) above:

(i) property of Japanese natural persons who during the war resided with the permission of the Government concerned in the territory of one of the

Allied Powers, other than territory occupied by Japan, except property subjected to restrictions during the war and not released from such restrictions as of the date of the first coming into force of the present Treaty;

(ii) all real property, furniture and fixtures owned by the Government of Japan and used for diplomatic or consular purposes, and all personal furniture and furnishings and other private property not of an investment nature which was normally necessary for the carrying out of diplomatic and consular functions, owned by Japanese diplomatic and consular personnel;

(iii) property belonging to religious bodies or private charitable institutions and used exclusively for religious or charitable purposes;

(iv) property, rights and interests which have come within its jurisdiction in consequence of the resumption of trade and financial relations subsequent to September 2, 1945, between the country concerned and Japan, except such as have resulted from transactions contrary to the laws of the Allied Power concerned;

(v) obligations of Japan or Japanese nationals, any right, title or interest in tangible property located in Japan, interests in enterprises organized under the laws of Japan, or any paper evidence thereof; provided that this exception shall only apply to obligations of

Japan and its nationals expressed in Japanese currency.

(III) Property referred to in exceptions (i) through (v) above shall be returned subject to reasonable expenses for its preservation and administration, if any such property has been liquidated the proceeds shall be returned instead.

(IV) The right to seize, retain, liquidate or otherwise dispose of property as provided in sub-paragraph (I) above shall be exercised in accordance with the laws of the Allied Power concerned, and the owner shall have only such rights as may be given him by those laws.

(V) The Allied Powers agree to deal with Japanese trademarks and literary and artistic property rights on a basis as favorable to Japan as circumstances ruling in each country will permit.

(b) Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Article 15

(a) Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was

within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favorable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

(b) With respect to industrial property rights impaired during the war, Japan will continue to accord to the Allied Powers and their nationals benefits no less than those heretofore accorded by Cabinet Orders No. 309 effective September 1, 1949, No. 12 effective January 28, 1950, and No. 9 effective February 1, 1950, all as now amended, provided such nationals have applied for such benefits within the time limits prescribed therein.

(c)(i) Japan acknowledges that the literary and artistic property rights which existed in Japan on December 6, 1941, in respect to the published and unpublished works of the Allied Powers and their nationals have continued in force since that date, and recognizes those rights which have arisen, or but for the war would have arisen, in Japan since that date, by the operation of any conventions and agreements to which Japan was a party on that date, irrespective of whether or not such conventions or agreements were abrogated or suspended upon or

since the outbreak of war by the domestic law of Japan or of the Allied Power concerned.

(ii) Without the need for application by the proprietor of the right and without the payment of any fee or compliance with any other formality, the period from December 7, 1941, until the coming into force of the present Treaty between Japan and the Allied Power concerned shall be excluded from the running of the normal term of such rights; and such period, with an additional period of six months, shall be excluded from the time within which a literary work must be translated into Japanese in order to obtain translating rights in Japan.

Article 16

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers, or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies, for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable. The categories of assets described in Article 14(a)(2)(II)(ii) through (v) of the present Treaty shall be excepted from transfer, as well as assets of Japanese natural persons not residents of Japan on the first coming into force of the Treaty. It is equally understood that the transfer provision of this Article has no application to the 19,770 shares in the Bank for International

Settlements presently owned by Japanese financial institutions.

Article 17

(a) Upon the request of any of the Allied Powers, the Japanese Government shall review and revise in conformity with international law any decision or order of the Japanese Prize Courts in cases involving ownership rights of nationals of that Allied Power and shall supply copies of all documents comprising the records of these cases, including the decisions taken and orders issued. In any case in which such review or revision shows that restoration is due, the provisions of Article 15 shall apply to the property concerned.

(b) The Japanese Government shall take the necessary measures to enable nationals of any of the Allied powers at any time within one year from the coming into force of the present Treaty between Japan and the Allied Power concerned to submit to the appropriate Japanese authorities for review any judgment given by a Japanese court between December 7, 1941, and such coming into force, in any proceedings in which any such national was unable to make adequate presentation of his case either as plaintiff or defendant. The Japanese Government shall provide that, where the national has suffered injury by reason of any such judgment, he shall be restored in the position in which he was before the judgment was given or shall be afforded such relief as may be just and equitable in the circumstances.

Article 18

(a) It is recognized that the intervention of the state of war has not affected the obligation to pay pecuniary

debts arising out of obligations and contracts (including those in respect of bonds) which existed and rights which were acquired before the existence of a state of war, and which are due by the Government or nationals of Japan to the Government or nationals of one of the Allied Powers, or are due by the Government or nationals of one of the Allied Powers to the Government or nationals of Japan. The intervention of a state of war shall equally not be regarded as affecting the obligation to consider on their merits claims for loss or damage to property or for personal injury or death which arose before the existence of a state of war, and which may be presented or re-presented by the Government of one of the Allied Powers to the government of Japan, or by the Government of Japan to any of the Governments of the Allied Powers. The provisions of this paragraph are without prejudice to the rights conferred by Article 14.

(b) Japan affirms its liability for the prewar external debt of the Japanese State and for debts of corporate bodies subsequently declared to be liabilities of the Japanese State, and expresses its intention to enter into negotiations at an early date with its creditors with respect to the resumption of payments on those debts to encourage negotiations in respect to other prewar claims and obligations; and to facilitate the transfer of sums accordingly.

Article 19

(a) Japan waives all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war or out of actions taken because of the existence of a state of war, and waives all claims arising from the presence, operations or actions of forces or

authorities of any of the Allied Powers in Japanese territory prior to the coming into force of the present Treaty.

(b) The foregoing waiver includes any claims arising out of actions taken by any of the Allied Powers with respect to Japanese ships between September 1, 1939, and the coming into force of the present Treaty, as well as any claims and debts arising in respect to Japanese prisoners of war and civilian internees in the hands of the Allied Powers, but does not include Japanese claims specifically recognized in the laws of any Allied Power enacted since September 2, 1945.

(c) Subject to reciprocal renunciation, the Japanese Government also renounces all claims (including debts) against German and German nationals on behalf of the Japanese Government and Japanese nationals, including inter-governmental claims and claims for loss or damage sustained during the war, but excepting (a) claims in respect of contracts entered into and rights acquired before September 1, 1939, and (b) claims arising out of trade and financial relations between Japan and Germany after September 2, 1945. Such renunciation shall not prejudice actions taken in accordance with Articles 16 and 20 of the present Treaty.

(d) Japan recognizes the validity of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities or authorized by Japanese law at that time, and will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions.

Article 20

Japan will take all necessary measures to ensure such disposition of German assets in Japan as has been or may be determined by those powers entitled under the Protocol of the proceedings of the Berlin Conference of 1945[1] to dispose of those assets and pending the final disposition of such assets will be responsible for the conservation and administration thereof.

Article 21

Notwithstanding the provisions of Article 25 of the present Treaty, China shall be entitled to the benefits of Articles 10 and 14(a)2; and Korea to the benefits of Articles 2, 4, 9 and 12 of the present Treaty.

CHAPTER VI

SETTLEMENT OF DISPUTES

Article 22

If in the opinion of any Party to the present Treaty there has arisen a dispute concerning the interpretation or execution of the Treaty, which is not settled by reference to a special claims tribunal or by other agreed means, the dispute shall, at the request of any party thereto, be referred for decision to the International Court of Justice. Japan and those Allied Powers which are not already parties to the Statute of the International Court of Justice will deposit with the Registrar of the Court, at the time of their respective ratifications of the present Treaty, and in conformity with the resolution of the United Nations

[1] Senate doc. 123. 51st Cong., 1st sess., p. 34.

Security Council, dated October 15, 1946,[1] a general declaration accepting the jurisdiction, without special agreement, of the Court generally in respect to all disputes of the character referred to in this Article.

CHAPTER VII

FINAL CLAUSES

Article 23

(a) The present Treaty shall be ratified by the States which sign it, including Japan, and will come into force for all the States which have then ratified it, when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States, namely Australia, Canada, Ceylon, France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The present Treaty shall come into force for each State which subsequently ratifies it, on the date of the deposit of its instrument of ratification.

(b) If the Treaty has not come into force within nine months after the date of the deposit of Japan's ratification, any State which has ratified it may bring the Treaty into force between itself and Japan by a notification to that effect given to the Governments of Japan and the United States of America not later than three years after the date of deposit of Japan's ratification.

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[1] U.N. Sec. Council Official Records, 1st year: 2d Series, No. 19.

Article 24

All instruments of ratification shall be deposited with the Government of the United States of America which will notify all the signatory States of each such deposit, of the date of the coming into force of the Treaty under paragraph (a) of Article 23, and of any notifications made under paragraph (b) of Article 23.

Article 25

For the purposes of the present Treaty the Allied Powers shall be the States at war with Japan, or any State which previously formed a part of the territory of a State named in Article 23, provided that in each case the State concerned has signed and ratified the Treaty. Subject to the provisions of Article 21, the present Treaty shall not confer any rights, titles or benefits on any State which is not an Allied Power as herein defined; nor shall any right, title or interest of Japan be deemed to be diminished or prejudiced by any provision of the Treaty in favor of a State which is not an Allied Power as so defined.

Article 26

Japan will be prepared to conclude with any State which signed or adhered to the United Nations Declaration of January 1, 1942, and which is at war with Japan, or with any State which previously formed a part of the territory of a State named in Article 23, which is not a signatory of the present Treaty, a bilateral Treaty of Peace on the same or substantially the same terms as are provided for in the present Treaty, but this obligation on the part of Japan will expire three years after the first coming into force of the present Treaty. Should Japan make a

peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.

Article 27

The present Treaty shall be deposited in the archives of the Government of the United States of America which shall furnish each signatory State with a certified copy thereof.

* * *

Multilateral — Treaty of Peace With Japan — Sept. 8, 1951

I CERTIFY THAT the foregoing is a true copy of the Treaty of Peace with Japan which was signed in the English, French, Spanish, and Japanese languages at San Francisco on September 8, 1951, the signed original of which is deposited in the archives of the Government of the United States of America.

IN TESTIMONY WHEREOF, I, DEAN ACHESON, Secretary of State of the United States of America, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this tenth day of September, 1951.

[SEAL]

DEAN ACHESON
Secretary of State

By M.P. CHAUVIN
Authentication Officer
Department of State

WHEREAS the Senate of the United States of America by their resolution of March 20, 1952, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the said Treaty with the following declaration:

> As part of such advice and consent the Senate states that nothing the treaty contains is deemed to diminish or prejudice, in favor of the Soviet Union, the right, title, and interest of Japan, or the Allied Powers as defined in said treaty, in and to South Sakhalin and its adjacent islands, the Kurile Islands, the Habomai Islands, the island of Shikotan, or any other territory, rights, or interests possessed by Japan on December 7, 1941, or to confer any right, title, or benefit therein or thereto on the Soviet Union; and also that nothing in the said treaty, or the advice and consent of the Senate to the ratification thereof, implies recognition on the part of the United States of the provisions in favor of the Soviet Union contained in the so-called 'Yalta agreement' regarding Japan of February 11, 1945."

WHEREAS the said Treaty was duly ratified by the President of the United States of America on April 15, 1952, in pursuance of the aforesaid advice and consent of the Senate and subject to the aforesaid declaration;

WHEREAS it is provided in Article 23 of the said Treaty that the Treaty will come into force for all the States which have then ratified it when instruments of ratification have been deposited by Japan and by a majority, including the United States of America as the principal occupying Power, of the following States,

namely Australia, Canada, Ceylon,[1] France, Indonesia, the Kingdom of the Netherlands, New Zealand, Pakistan, the Republic of the Philippines, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, and in Article 24 of the said Treaty that all instruments of ratification shall be deposited with the Government of the United States of America;

WHEREAS instruments of ratification of the said Treaty were deposited with the Government of the United States of America by Japan on November 28, 1951 and by the United Kingdom of Great Britain and Northern Ireland on January 3, 1952, by Australia on April 10, 1952, by New Zealand on April 10, 1952, by Canada on April 17, 1952, by Pakistan on April 17, 1952, by France on April 18, 1952, and by the United States of America on April 28, 1952;

WHEREAS instruments of ratification were also deposited with the Government of the United States of America by Mexico on March 3, 1952 and by Argentina on April 9, 1952;

AND WHEREAS, pursuant to the aforesaid provisions of Article 23 of the said Treaty, the Treaty came into force on April 28, 1952;

NOW, THEREFORE, be it known that I, Harry S. Truman, President of the United States of America, do hereby proclaim and make public the said Treaty of Peace with Japan to the end that the same and every article and clause thereof, subject to the declaration hereinbefore recited, shall be observed and fulfilled with good faith, on

---

[1] Ratification deposited Apr. 28, 1952.

and after April 28, 1952, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, and do hereby further proclaim that the state of war between the United States of America and Japan terminated on April 28, 1952.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-eighth day of April in the year of our Lord one thousand nine hundred fifty-two and of the Independence of the United States of America the one hundred seventy-sixth.

[SEAL]

HARRY S TRUMAN

By the President:

Dean Acheson
Secretary of State

Note by the Department of State

Signatures affixed to the Treaty of Peace with Japan are as follows:

FOR ARGENTINA:
HIPÓLITO J. PAZ

FOR AUSTRALIA:
PERCY C SPENDER

FOR THE KINGDOM OF BELGIUM:
PAUL VAN ZEELAND
SILVERCRUYS.

FOR BOLIVIA:
LUIS GUACHALLA

FOR BRAZIL:
CARLOS MARTINS
A. DE MELLO-FRANCO

FOR CAMBODIA:
PHLENG

FOR CANADA:
LESTER B. PEARSON
R W MAYHEW

FOR CEYLON:
J. R. JAYEWARDENE
G. C. S. COREA
R. G. SENANAYAKE

FOR CHILE:
F. NIETO DEL RIO

FOR COLOMBIA:
CIPRIANO RESTREPO JARAMILL
SEBASTIÁN OSPINA

FOR COSTA RICA:
J. RAFAEL OREAMUNO.
V. VARGAS ALFARO
LUIS DOBLES SÁNCHEZ

FOR CUBA:
O GANS
L. MACHADO
JOAQUIN MEYER

FOR THE DOMINICAN REPUBLIC:
V. ORDÓÑEZ
LUIS F. THOMEN

FOR EQUADOR:
A. QUEVEDO
R. G. VALENZUELA

FOR EGYPT:
KAMIL A. RAHIM

FOR EL SALVADOR:
HÉCTOR DAVID CASTRO
LUIS RIVAS PALACIOS

FOR ETHIOPIA:
MEN YAYEHIRAD

FOR FRANCE:
SCHUMAN
H. BONNET
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FOR HAITI:
JACQUES N. LÉGER
GUST LARAQUE

FOR HONDURAS:
J.E. VALENZUELA.
ROBERTO GÁLVEZ B.
RAÚL ALVARADO T

FOR INDONESIA:
AHMAD SUBARDJO.

FOR IRAN:
A G ARDALAN

FOR IRAQ:
A. I. BAKR

FOR LAOS:
SAVANG

FOR LEBANON:
CHARLES MALIK

FOR LIBERIA:
GABRIEL L DENNIS
JAMES ANDERSON
RAYMOND HORACE
J. RUDOLPH GRIMES

FOR THE GRAND DUCHY OF LUXEMBOURG:
HUGUES LE GALLAIS

FOR MEXICO:
RAFAEL DE LA COLINA
GUSTAVO DÍAZ ORDAZ
A. P. GASGA

FOR THE KINGDOM OF THE NETHERLANDS:
D U STIKKER
J H VAN ROIJEN.

FOR NEW ZEALAND:
C BERENDSEN

FOR NICARAGUA:
G SEVILLA SACASA
GUSTAVO MANZANARES

FOR THE KINGDOM OF NORWAY:
WILHELM MUNTHE MORGENSTIERNE

FOR PAKISTAN:
ZAFRULLA KHAN

FOR PANAMA:
IGNACIO MOLINO
JOSÉ A REMÓN
ALFREDO ALEMÁN
J. CORDOVEZ

FOR PARAGUAY:
LUIS OSCAR BOETTNER

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ASAD AL-FAQIH

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FOR THE UNION OF SOUTH AFRICA:
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FOR VIET NAM:

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FOR JAPAN:

SHIGERU YOSHIDA
HAYATO IKEDA
GIZO TOMABECHI
NIRO HOSHIJIMA
MUNEYOSHI TOKUGAWA.
HISATO ICHIMADA

(2)

No. 04-499

IN THE

Supreme Court of the United States

JAE WON JEONG,

Petitioner,

v.

TAIHEIYO CEMENT CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether World War II forced labor claims asserted by former Korean nationals under California Code of Civil Procedure § 354.6 are preempted by the United States' exclusive authority over foreign relations and the foreign policy, embodied in Articles 4(a) and 26 of the 1951 Treaty of Peace with Japan, that such claims must be resolved through bilateral negotiations between Japan and Korea, rather than through litigation in state court.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Taiheiyo Cement Corporation has no parent company, and no other publicly held company owns 10% or more of its stock. Taiheiyo Cement U.S.A., Inc., is a wholly owned subsidiary of Taiheiyo Cement Corporation. California Portland Cement Co. and Glacier Northwest, Inc. (f/k/a Lone Star Northwest, Inc.) are wholly owned subsidiaries of Taiheiyo Cement U.S.A., Inc.

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BRIEF OF RESPONDENTS IN OPPOSITION

The California Court of Appeal's decision in this case is mandated by *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), and agrees with the Ninth Circuit's holding that World War II forced labor claims identical to those asserted here are barred by the federal government's exclusive authority over foreign relations. *See Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003). Because *Garamendi* resolves every issue presented by the Petition, and because there is no conflict among the lower courts for this Court to resolve, the Petition for certiorari should be denied.

The 1951 Treaty of Peace with Japan ("the 1951 Treaty" or "Treaty"), 3 U.S.T. 3169 (App. 134-64), established a framework for the resolution of claims against Japan and its nationals arising out of World War II – including the forced labor claims asserted here by petitioner, a former Korean national. Articles 14 and 19 of the Treaty provided for a mutual waiver of claims by the Allies and Japan and their respective nationals. App. 147, 151-52; *see* n.2, *infra*. The Treaty contemplated that claims by non-signatory nations, such as Korea and China, and their nationals, would be resolved through negotiations between Japan and the affected countries. Article 4(a) mandated that the "claims . . . of [Korean] authorities *and residents* against Japan *and its nationals*, shall be the subject of special arrangements between Japan and [Korean] authorities." App. 136-37 (emphasis added).[1] Article 26 further required Japan "to conclude with any State . . . which is not a signatory of the present Treaty, a bilateral Treaty of Peace" to resolve World War II claims. (App. 155-56).

The California Court of Appeal held that "Articles 4(a) and 26 embody the federal purpose and foreign policy that WWII

1. The Treaty specifically defines the term "nationals" to include "juridical persons," such as respondents. 1951 Treaty, art. 4(a) (App. 137).

claims by individuals of non-signatory nations were to be resolved through diplomacy," *Taiheiyo Cement Corp. v. Super. Ct.*, 117 Cal. App. 4th 380, 392 (2004) (App. 16), thus preempting petitioner's attempt to resolve his forced labor claims through state-court litigation under California's recently enacted World War II forced labor statute. The Court of Appeal's decision was required by *Garamendi*, in which this Court held that a California statute seeking to facilitate the resolution of World War II era insurance claims was preempted by the federal government's foreign affairs powers. 539 U.S. at 401. This Court held that U.S. executive agreements that "embod[ied]" a foreign policy to resolve World War II claims, but that "include[d] no preemption clause," were sufficient to preempt the California law under the federal government's foreign affairs power. *Id.* at 417.

Here, the Court of Appeal correctly recognized that "*Garamendi* compels our conclusion that . . . California's law conflicts with the foreign policy expressed in the 1951 Treaty." *Taiheiyo Cement*, 117 Cal. App. 4th at 398 (App. 26). Indeed, the Court of Appeal found preemption here "even more compelling" than in *Garamendi* itself, because the foreign policy barring petitioner's claims was established by a treaty formally ratified by the Senate, not just by executive agreements, as in *Garamendi*. *Id.* at 397 (App. 24).

The Court of Appeal's decision thus joined the decision of the United States Court of Appeals for the Ninth Circuit in holding California's World War II forced labor statute unconstitutional on foreign affairs grounds. *See Deutsch*, 324 F.3d at 706-16. This Court denied certiorari in *Deutsch*, and it should do so here as well.

Certiorari is also unwarranted because petitioner's claims are barred by other constitutional doctrines not reached by the opinion under review. Among these are the political question doctrine and due process limitations on the extraterritorial application of state law.

For all of these reasons, the Petition should be denied.

STATEMENT OF THE CASE

A. The United States' Resolution of World War II Claims Concerning Japan

In the aftermath of World War II, the United States viewed a "free, prosperous and democratic Japan" as "an important stabilizing influence in the Far East" in the face of "[mounting] international tensions" in that region. *Japanese Peace Treaty and Other Treaties Relating to Security in the Pacific, Report of the Committee on Foreign Relations*, Sen. Exec. Rep. No. 82-2 (1952) (hereinafter "Sen. Exec. Rep. No. 82-2"), at 2.

One of the most difficult questions confronting the negotiators of the 1951 Treaty was the issue of reparations – not only for the Allies and their nationals, but for Korea and China and their nationals. Potential Allied claims against Japan amounted to more than $100 billion in 1952 dollars. *See id.* at 13. In the Senate Foreign Relations Committee's view, "It would obviously be impossible for Japan to pay more than a very small fraction of such a huge amount." *Id.*; *see also* 1951 Treaty, art. 14(a) (App. 144) (recognizing "that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damages and suffering and at the same time meet its other obligations").

In the 1951 Treaty, the United States and the other Allied Powers established a framework for the resolution of claims arising out of the events of World War II in the Pacific. In so doing, the United States adhered to the principle that "reparations for war losses is a . . . matter *to be settled between governments*" and that "it is the . . . responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable . . . out of reparations that may be received from Japan or from other sources." Sen. Exec. Report No. 82-2 at 13 (emphasis added).

As to signatories, including the United States, the 1951 Treaty provided specified reparations and waived all further claims of the Allies and their nationals against Japan and its nationals arising out of actions taken in the course of the prosecution of the war. 1951 Treaty, articles 14-19, (App. 144-47, 151-52).[2]

As to non-signatories, the 1951 Treaty established a framework for the resolution of war claims through bilateral negotiations between Japan and the affected nations. *See generally Joo v. Japan*, 332 F.3d 679, 685 (D.C. Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2835 (2004). Principal among the non-signatories was Korea, which was not a signatory to the 1951 Treaty because, as part of the Empire of Japan until the end of World War II, it had not been at war with Japan. Tab 32 at 1783, 1785.[3] Nonetheless, the Treaty negotiators inserted several provisions intended to address the post-war issues outstanding between Korea and Japan, including compensation for Korea and its nationals. Article 21 of the 1951 Treaty gave Korea the benefits of Articles 2, 4, 9 and 12 of the Treaty, which dealt with the recognition of Korean independence, the right of Korean authorities to seize all Japanese-owned assets in Korea, and the right of Korea to obtain

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2. The waiver of Allied and Allied nationals' claims against Japan and its nationals is discussed extensively in *Mitsubishi Materials Corp. v. Super. Ct.*, 113 Cal. App. 4th 55 (2003), *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939 (N.D. Cal. 2000), *aff'd sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Tenney v. Mitsui & Co., Ltd.*, 540 U.S. 820 (2003), and *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153 (N.D. Cal. 2001), *aff'd sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Saldajeno v. Ishihara Sangyo Kaisha, Ltd.*, 540 U.S. 821 (2003).

3. Tab references are to the Appendix of Exhibits in Support of Petition for Writ of Mandate, Prohibition or Other Appropriate Relief, filed in the California Court of Appeal.

certain economic agreements on a most-favored-nation basis, as well as other commercial rights. (App. 135-37, 140-43, 153).

In return, Article 4(a) provided that the "claims . . . of [Korean] authorities and residents against Japan and its nationals, *shall be the subject of special arrangements* between Japan and [Korean] authorities." (App. 136-37) (emphasis added).

Similarly, the 1951 Treaty established a framework for post-war relations between Japan and China. Article 21 of the Treaty gave China the benefits of Articles 10 and 14(a)(2), entitling China to seize all property of Japan and Japanese businesses located in China, and providing for Japan's renunciation of any claim to Chinese territory. (App. 141, 145-47, 153). Article 26 obligated Japan to conclude a treaty with China "on the same or substantially the same terms" as the 1951 Treaty (App. 155-56), that is, one that would resolve the claims of China and its nationals just as the 1951 Treaty had for the Allies and their nationals.

These provisions of the 1951 Treaty established, as a matter of U.S. foreign policy, that the World War II claims of Korea, China and their nationals were to be resolved "through government-to-government negotiation." *Joo*, 332 F.3d at 685.

The framework established by the 1951 Treaty was in large part a success, resulting in the negotiated settlement of the World War II claims of the Republic of Korea (South Korea), the Republic of China (Taiwan), the People's Republic of China (China), and their respective nationals.

Japan and South Korea entered into a war claims settlement in 1965. *See* Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Co-operation, June 22, 1965, Japan-Republic of Korea, 583 U.N.T.S. 258 ("Claims Treaty"), Tab 7 at 315. The Claims Treaty "settled completely and finally" all claims of South Korea and

Japan "and their nationals" including, but not limited to, "those provided for in Article IV, paragraph (a) of the [1951 Treaty]," (*id.*, art. 2 ¶ 1, 583 U.N.T.S. at 260, Tab 7 at 318) and also including "any claim falling within the scope of the 'Outline of the Claims of the Republic of Korea against Japan' (the so-called 'Eight Items')." Agreed Minutes to the Agreement on the Settlement of Problem Concerning Property and Claims and on the Economic Co-operation Between Japan and the Republic of Korea, June 22, 1965, para. 2(g), 583 U.N.T.S. 290, 292, Tab 7 at 350. The Eight Items, in turn, specifically include "[c]laims by Koreans against Japanese nationals or corporations" and the claims of "Korean draftees," such as petitioner. Tab 7 at 370.

Pursuant to Article 26 of the 1951 Treaty, Japan concluded agreements with Taiwan in 1952[4] and with China in 1972 and 1978,[5] which similarly resolved the wartime claims of those

4. *See* Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 138 U.N.T.S. 3, 38 (the "ROC Treaty"). The ROC Treaty incorporated the "relevant provisions" of the 1951 Treaty as the rule by which "any problem" between the signatories resulting from "the existence of a state of war" "shall be settled," unless the ROC Treaty, or its supplementary documents, provided otherwise. *Id.*, art. XI, 138 U.N.T.S. at 42. Because Article 14 of the 1951 Treaty deals with a problem resulting from the war – the settlement of war claims against Japan and its nationals – Article XI incorporates Article 14's provisions and resolves the claims of the ROC and its nationals, including war-time forced labor claims.

5. In 1972, Japan and the People's Republic of China ("PRC") issued a Joint Communiqué in which the PRC "renounce[d] its demand for war reparation from Japan." Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Sept. 29, 1972, para. 5, *available at* <www.taiwandocuments.org/japan01.htm>. In 1978 Japan and the PRC formalized their relations in the Treaty of Peace and Friendship Between Japan and the People's Republic of China, Aug. 12, 1978, 1225 U.N.T.S. 257, 269 (the "PRC Treaty"), incorporating and reaffirming the terms of the Joint (Cont'd)

countries and their nationals. As to North Korea, the negotiations contemplated by Article 4(a) remain unresolved and are ongoing.[6]

B. The California World War II Forced Labor Statute

In 1999, California enacted a statute that permits World War II forced and slave laborers to sue those companies for which they were forced to work to benefit the Axis Powers' war effort. *See* Cal. Code Civ. Proc. § 354.6 (hereinafter cited as "§ 354.6") (App. 131-32). The statute provides that any "Second World War forced labor victim" or "Second World War slave labor victim," or their heirs, "may bring an action to recover compensation" for their labor. § 354.6(b) (App. 132). Forced and slave labor victims are defined as people forced to perform labor without pay by the "Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers," between 1929 and 1945. § 354.6(a)(1) & (2) (App, 131). The statute creates and defines the recoverable compensation based on market value plus compounded interest computed without diminution due to "wartime or postwar currency devaluation." § 354.6(a)(3) (App. 131-32). The statute provides that an "action brought under this section" shall not

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(Cont'd)
Communiqué, which included the renunciation of "reparation[s]." The PRC Treaty thus resolved the forced labor claims of PRC nationals. *See generally Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 275 (D.N.J. 1999) (under international law, "reparations" include individuals' war-time forced labor claims against governments and private businesses).

6. *See* The Views of the Government of Japan on the Lawsuits against Japanese Companies by the Nationals of Countries Not Being Parties to the San Francisco Peace Treaty, Tab 32 at 1785 ("The Government of Japan has conducted normalization talks with North Korea eight times from 1991 to 1992 and already three times after the resumption of the negotiations in April 2000.").

be dismissed on statute of limitations grounds if it is filed by December 31, 2010. § 354.6(c) (App. 132).

C. Jeong's Claims

Petitioner Jae Won Jeong asserts causes of action under Section 354.6, and for unjust enrichment, injury in tort and unfair business practices. Tab 1 at 15-18.[7] Jeong, now a United States citizen, alleges that he was a Korean college student in Tokyo in 1943. Tab 1 at 11-12. He alleges that when he refused the Japanese government's order that he and other students report to the Japanese military for service, he was detained by the Japanese police and later sent to Korea. Tab 1 at 12. Once in Korea, he was allegedly imprisoned by the Japanese "colonial" government, and sent to a camp run by the government for "[v]olunteer [s]oldier [t]raining." Tab 1 at 12-13.

Jeong alleges that in 1944, he was transferred by government authorities to a cement factory in Korea, which was operated "by and for the benefit of the Japanese Onoda Cement Manufacturing Company under the color of the Japanese authority." Tab 1 at 13. He alleges that "World War II imposed great demands on the Japanese industry, which suffered from an acute shortage of workers," leading the Japanese government to set up programs using "Korean nationals and Allied prisoners" to perform forced labor. Tab 1 at 14. This was to "benefit[] the Japanese war effort." *Id.* Jeong alleges that while at the factory, he and other workers performed "hard physical labor," for which they were allegedly not paid. Tab 1 at 13. Jeong sued respondents (collectively, "Taiheiyo"), alleging that they are successors to Onoda.

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7. The Court of Appeal held Jeong's claims other than his cause of action under Section 354.6 time-barred on state-law grounds. *See Taiheiyo Cement*, 117 Cal. App. 4th at 398 n.10 (App. 26). The Petition does not seek review of that holding.

D. Procedural History

1. Taiheiyo's Motions for Judgment on the Pleadings

Taiheiyo moved for judgment on the pleadings, on the grounds that the 1951 Treaty, the 1965 Japan-Korea Claims Treaty, and the political question doctrine bar Jeong's claims. Tab 5. The Superior Court denied the motion. App. 85-104. Taiheiyo then filed a second motion for judgment on the pleadings, on the grounds that Section 354.6 is an unconstitutional interference with the federal government's exclusive authority over foreign relations,[8] and that due process forbids the extraterritorial application of California law to Jeong's claims, which arose in East Asia during World War II. Tab 22.

The United States filed a Statement of Interest in support of Taiheiyo's second motion for judgment on the pleadings. The United States explained that Section 354.6 "is unconstitutional because it impermissibly interferes with the United States' exercise of its foreign policy powers and conflicts with international obligations entered into by this nation at the close of World War II." Tab 32 at 1690. The government explained that the 1951 Treaty "establish[ed] a diplomatic framework for the resolution of claims by non-party nations," Tab 32 at 1698, and that "[i]n entering into the Treaty, the President and the Senate clearly did not intend to leave any jurisdiction over war claims or reparations to the States." Tab 32 at 1699.

The Superior Court denied Taiheiyo's second motion for judgment on the pleadings, concluding that Section 354.6 was constitutional because it had no direct impact on foreign

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8. Taiheiyo's second motion cited an intervening federal district court decision that held Section 354.6 unconstitutional on foreign affairs grounds. *See In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001), *aff'd sub nom. Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003).

relations, and that due process did not bar the application of Section 354.6 to Jeong's claims. (App. 71-84).

2. Taiheiyo's Petition for a Writ of Mandate

Taiheiyo petitioned for a writ of mandate in the California Court of Appeal. The United States filed an amicus brief in support of Taiheiyo's petition. The United States argued that Jeong's claims under Section 354.6 are barred by the foreign policy embodied in Articles 4(a) and 26 of the 1951 Treaty that "both Korea and China were expected to settle, as the Allied powers had, the war-related claims of themselves and their nationals against Japan and its nationals." Brief of the United States as Amicus Curiae in Support of Petitioners (dated Feb. 11, 2002), at 21. The government explained that "California's forced labor statute" is preempted because it "runs directly contrary to the United States' foreign policy of relegating the war-related claims of Korean and Chinese nationals to inter-governmental resolution." *Id.* The United States also argued that the extraterritorial application California law to Jeong's claims would violate due process. *Id.* at 35-40.

In its first opinion, the Court of Appeal acknowledged that "[t]he 1951 Treaty . . . provides that claims between Korean and Japanese nationals were to be the subject of separate arrangements between the two countries." *Taiheiyo Cement Corp. v. Super. Ct.*, 129 Cal. Rptr. 2d 451, 459 (Ct. App. 2d Dist. 2003) (App. 42). Nonetheless, the court held that Jeong's claims could proceed because "[n]othing in . . . the 1951 Treaty *expressly preempts* or bars claims by Korean nationals against Japanese corporations." *Id.* at 458 (App. 42) (emphasis added). The court also held that Section 354.6 does not unconstitutionally infringe on the federal government exclusive authority to regulate foreign relations, and it rejected Taiheiyo's political question and due process arguments. *Id.* at 465-72 (App. 47-69).

The California Supreme Court granted Taiheiyo's petition for review. *Taiheiyo Cement Corp. v. Super. Ct.*, 66 P.3d 1231, 133 Cal. Rptr. 2d 147 (Cal. 2003). While review was pending, this Court issued its decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). *Garamendi* held that a California statute seeking to facilitate the resolution of World War II era insurance claims was preempted by the federal government's foreign affairs powers. *Id.* at 413-26. This Court held that U.S. executive agreements that "embod[ied]" a foreign policy to resolve World War II claims, but that "include[d] no preemption clause," were sufficient to preempt the California law under the federal government's foreign affairs power, *id.* at 417, and the Court specifically upheld the power of the federal government "to settle claims against foreign corporations associated with wartime experience." *Id.* at 416.

In the wake of *Garamendi*, the California Supreme Court vacated the Court of Appeal's first opinion and transferred the case back to the Court of Appeal for reconsideration in light of *Garamendi*. *Taiheiyo Cement Corp. v. Super. Ct.*, 77 P.3d 2, 5 Cal. Rptr. 3d 31 (Cal. 2003). Following transfer, the United States filed another amicus brief in support of Taiheiyo, arguing that Jeong's forced labor claims were clearly barred under *Garamendi*. *See* Supplemental Brief of the United States as Amicus Curiae in Support of Petitioners (dated Oct. 24, 2003).

In its second opinion, the Court of Appeal agreed that *Garamendi* controls and requires Jeong's lawsuit to be dismissed: "*Garamendi* . . . compels us to conclude section 354.6 is unconstitutional." *Taiheiyo Cement Corp. v. Super. Ct.*, 117 Cal. App. 4th 380, 387 (2004) (App. 6); *see also id.* at 400 (Rubin, J., concurring) (App. 30) ("we must" grant Taiheiyo's writ petition "under *Garamendi*'s compulsion"). The Court of Appeal held that "similar to the executive agreements in *Garamendi*, Articles 4(a) and 26 [of the 1951 Treaty] embody the federal purpose and foreign policy that WWII claims by individuals of non-signatory nations were to be resolved through

diplomacy." *Id.* at 392 (App. 16). Thus, under the reasoning of *Garamendi*, "the treaty preempts section 354.6" because allowing the claims of "WWII slave or forced labor victims to be resolved in court . . . conflicts with the foreign policy expressed in the 1951 Treaty." *Id.* at 398 (App. 26).

The California Supreme Court denied review. (App. 130).

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT TO RESOLVE

The Court of Appeal in this case agreed with the Ninth Circuit's holding in *Deutsch* that World War II forced labor claims under Section 354.6 are barred by the federal government's exclusive authority over foreign relations as embodied in the 1951 Treaty. These decisions are binding precedent on every state and federal trial court in California, and Section 354.6 exists nowhere else. There is no conflict that warrants this Court's review. *See* Supreme Ct. R. 10(a), (b).

Deutsch upheld the dismissal of 29 World War II forced labor cases, all asserting claims under Section 354.6, including claims by former Korean nationals identical to those asserted here. *Deutsch*, 324 F.3d at 708-16. Anticipating this Court's decision in *Garamendi*, the Ninth Circuit followed the long-standing "constitutional principle that power over foreign affairs is reserved to the federal government." *Id.* at 709. The court observed that at the very core of the foreign affairs power lies "the power of the federal government to make and to resolve war, including the power to establish the procedure for resolving war claims." *Id.* at 711. In the context of World War II, the United States exercised that power as to Japan in the 1951 Treaty of Peace, which established "the federal government's resolution of disputes relating to the war." *Id.* at 714. The court explained

that the Treaty bars World War II forced labor claims by plaintiffs of countries signatory and non-signatory alike:

> It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

Id. at 714 n.14.

Four months after this Court issued its decision in *Garamendi*, it denied all of the petitions for certiorari in *Deutsch*. *See Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003) (denying certiorari); *Tenney v. Mitsui & Co., Ltd.*, 540 U.S. 820 (2003) (same); *Ma v. Kajima Corp.*, 540 U.S. 820 (2003) (same); *Saldajeno v. Ishihara Sangyo Kaisha, Ltd.*,, 540 U.S. 821 (2003) (same).

The California Court of Appeal's decision in this case accords with *Deutsch* and follows *Garamendi*. The Court of Appeal recognized the federal government's exclusive authority over foreign relations, as recently reaffirmed by *Garamendi*. *See Taiheiyo Cement*, 117 Cal. App. 4th at 388-90 (App. 9-12); *see also Zschernig v. Miller*, 389 U.S. 429 (1968). It agreed that the 1951 Treaty established the resolution of World War II claims against Japan and its nationals, *id.* at 390-94 (App. 13-19), and it held that Jeong's forced labor claim under Section 354.6 was preempted by "th[is] expression of federal policy embodied in the 1951 Treaty." *Id.* at 395 (App. 20).

The Court of Appeal's decision also agreed with the D.C. Circuit Court of Appeals in its analysis of the application of the 1951 Treaty to the World War II claims of non-signatory nationals, specifically former Korean nationals. *See id.* at 393-

94 (App. 18-19) (quoting *Joo v. Japan*, 332 F.3d 679, 681, 684-85 (D.C. Cir. 2003), *vacated on other grounds*, 124 S. Ct. 2835 (2004)). *Joo v. Japan* similarly held that Articles 4(a) and 26 of the 1951 Treaty "expressed a clear policy of resolving the claims of [non-signatory] nationals through government-to-government negotiation." 332 F.3d at 685. Thus, there is no conflict over the meaning of the 1951 Treaty.

The Petition does not contend there is a conflict for this Court to resolve. There is none. The Petition ignores *Deutsch* completely, even though it reached the same holding the California Court of Appeal did here. Ironically, the Petition criticizes the California Court of Appeal for its *agreement* with the D.C. Circuit on the proper interpretation of the 1951 Treaty. *See* Petition at 21 (chiding the Court of Appeal because it "uncritically accepted" the D.C. Circuit's interpretation of the 1951 Treaty).

Because there is no conflict that requires this Court's resolution, the Petition should be denied.

II. THE PETITION SHOULD BE DENIED BECAUSE *GARAMENDI* RESOLVES ALL OF PETITIONER'S ARGUMENTS

The Petition's principal argument is that the Court of Appeal supposedly misinterpreted *Garamendi*. Petitioner could not be more wrong. The Court of Appeal correctly recognized that *Garamendi* "compels" the dismissal of Jeong's Section 354.6 claim, *Taiheiyo Cement*, 117 Cal. App. 4th at 398 (App. 26) – indeed, that preemption in this case "is *far more compelling*" than in *Garamendi* itself. *Id.* at 393 (App. 17) (emphasis added). Because *Garamendi* resolves all of the arguments raised by the Petition, certiorari should be denied.

A. *Garamendi*

Garamendi struck down California's Holocaust Victim Insurance Relief Act ("HVIRA"), holding the statute to be an

unconstitutional intrusion on the federal government's exclusive power over foreign relations. HVIRA "require[d] any insurer doing business in [California] to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one 'related' to it." 539 U.S. at 401. This Court saw a conflict between HVIRA and executive agreements between the United States and Germany, which created a voluntary fund to investigate the status of insurance policies issued to Holocaust victims and to settle claims under those policies. *See id.* at 406-08.

The executive agreements in Garamendi "include[d] no preemption clause," and so the United States and the plaintiffs in *Garamendi* "le[ft] their claim of preemption to rest on asserted interference with the foreign policy those agreements *embody*." *Id.* at 417 (emphasis added).

In holding HVIRA unconstitutional, this Court began its analysis with premises of constitutional law that "are beyond dispute." *Id.* at 413. First, of course, was the federal government's supreme power over foreign relations and the fact:

> that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the "concern for uniformity in this country's dealings with foreign nations" that animated the Constitution's allocation of the foreign relations power to the National government in the first place.

Id. (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)).

The Court also recognized the undisputed "executive authority to decide what that [foreign] policy should be," including the President's long-standing "authority to make 'executive agreements' with other countries requiring no ratification by the Senate or approval by Congress." *Id.* at 414.

The Court further held that the federal government's traditional authority over foreign relations applied to the claims of private individuals against private companies arising out of actions in wartime: "Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed." *Id.* at 421.

With these premises, the Court held that HVIRA conflicted with U.S. foreign policy as embodied in the executive agreements. The agreements reflected a desire by the U.S. "to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Id.* HVIRA undermined that goal because it imposed a broader disclosure requirement than the executive agreements did and attached a monetary sanction for failing to comply. *Id.* at 423-25.

The Court acknowledged that HVIRA's basic purpose – "obtaining compensation for Holocaust victims" – was "a goal espoused by the National Government as well." *Id.* at 425. Nonetheless, the fact that HVIRA imposed broader requirements than the federal law, with a more severe economic penalty, was sufficient to render the law unconstitutional under the foreign affairs doctrine: "The basic fact is that California seeks to use an iron fist where the President has consistently chosen kid gloves." *Id.* at 427. Accordingly, the Court held HVIRA preempted by the federal government's exclusive authority over foreign relations. *Id.*

B. *Garamendi* Controls

The Court of Appeal was right that *Garamendi* controls. Articles 4(a) and 26 embody the foreign policy "determination that claims of non-signatory nations like Korea, and their nationals, were to be resolved with Japan through government-to-government negotiations." *Taiheiyo Cement*, 117 Cal. App.

4th at 398 (App. 26). Just as HVIRA was preempted because it conflicted with the foreign policy embodied in the executive agreements at issue in *Garamendi*, so too does Section 354.6 "conflict[] with the foreign policy expressed in the 1951 Treaty" by encouraging the litigation of claims in California state courts that the Treaty consigns to diplomatic resolution. *Id.*[9]

Jeong's criticisms of the Court of Appeal's decision are meritless and foreclosed by *Garamendi* itself.

1. The Foreign Policy Embodied In the Treaty

Petitioner acknowledges that Article 4(a) of the 1951 Treaty states that the World War II claims of non-signatory nationals "shall be the subject of special arrangements between Japan and . . . [Korean] authorities." Petition at 17 (quoting Article 4(a)). He does not dispute that his claims fall within Article 4(a). Nor does he deny that litigating his Section 354.6 claim in state court is the antithesis of "special arrangements" arrived at through diplomatic negotiation between Japan and Korea.

Those facts are dispositive. Given the plain language of Article 4(a) – and the obvious incompatibility between resolving a claim through intergovernmental negotiation, on the one hand, or litigation in state court, on the other – Jeong's assertion that

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9. *Garamendi* also controls for a second reason. In addition to the "conflict" theory of foreign affairs preemption that was the basis for striking down HVIRA, *Garamendi* recognized a "field" preemption theory under *Zschernig v. Miller*, 389 U.S. 429 (1968):

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict.

Garamendi, 539 U.S. at 419 n.11. Here, as the Ninth Circuit properly held, Section 354.6 is also invalid under *Zschernig* "field" preemption. *See Deutsch*, 324 F.3d at 708-16.

the 1951 Treaty does not embody a foreign policy that preempts his claims is meritless.

Jeong's argument that the 1951 Treaty is not quite clear enough in preempting his claims is foreclosed by *Garamendi*. In essence, Jeong argues that it was not sufficient for the President to propose, and the Senate to ratify, a treaty expressly stating that his forced labor claim "shall" be resolved through negotiations between Japan and Korea. Petition at 17. Rather, according to Jeong, the United States was required to also expressly state that the Treaty *preempts* state-law claims that are inconsistent with this diplomatic resolution. Petition at 16-17. That argument, however, is directly contrary to *Garamendi*. *Garamendi* struck down California's HVIRA precisely because it interfered with "the foreign policy those [executive] agreements embody," even though "the agreements *include no preemption clause*." 540 U.S. at 417 (emphasis added).

2. The Executive's Interpretation Of The Treaty

The bulk of the Petition consists of criticisms of the Executive Branch's interpretation of the 1951 Treaty and of the Court of Appeal for supposedly deferring to that interpretation. Jeong accuses the government of being inconsistent in its interpretation of the Treaty; he complains the government's position was created only for litigation; and he asserts that allowing the Executive Branch's interpretation of a treaty to bar his claims would violate "basic principles of separation of powers and federalism" by transferring "authority from the States and Congress to the Executive." Petition at 22.

All of Jeong's arguments ignore the fact that the foreign policy that bars his claims was established in the 1951 Treaty itself, not by unilateral executive action. "After all," the Court of Appeal explained, "rather than unilateral presidential agreements, we are dealing with federal policy expressed through a ratified treaty, the ultimate formal expression of the

federal executive *and legislative* branches in matters of foreign policy." *Taiheiyo Cement*, 117 Cal. App. 4th at 393 (App. 17) (emphasis added); *accord*, *Mitsubishi Materials*, 113 Cal. App. 4th at 79 ("If, in *Garamendi*, the high court would see no constitutional impediment to the *federal executive's* efforts to compromise property claims of civilian Holocaust victims, then a fortiori there can no constitutional impediment where a *treaty* (not just the unilateral efforts of one administration) compromises claims") (emphasis original). That is precisely why preemption in this case "is far more compelling" than in *Garamendi*. *Taiheiyo Cement*, 117 Cal. App. 4th at 393 (App. 17).

It is ironic – indeed, doubly ironic – that Jeong's principal criticism of the Court of Appeal's decision is for its supposedly unwarranted deference to the Executive Branch. There is not a word in the Court of Appeal's opinion that suggests that the Court actually did defer to the Executive in its interpretation of the Treaty. In concluding that the 1951 Treaty embodies a foreign policy that Jeong's claims must be resolved through diplomatic negotiation, rather than litigation, the Court of Appeal cited only the language of the Treaty, other court decisions interpreting the Treaty, and a Senate Executive Report from the time of the Treaty's ratification. *Taiheiyo Cement*, 117 Cal. App. 4th at 390-94 (App. 13-19). Thus, Jeong's insistence that there must be "an independent judicial determination" of what the Treaty means, as opposed to mere deference to the Executive, *see* Petition at 24, is precisely what the Court of Appeal already did.

The second irony in Jeong's critique of deferring to the Executive is that he is really criticizing *Garamendi*, not the Court of Appeal's decision in this case. It was *Garamendi*, after all, that held that executive agreements "requiring no ratification by the Senate or approval by Congress" can preempt state law and "settle [war] claims." 540 U.S. at 415.

In any event, Jeong's criticism of the government is baseless. The federal government has argued throughout this case that Jeong's claims under Section 354.6 are preempted by the foreign policy embodied in the 1951 Treaty. *See, e.g.*, Brief of the United States as Amicus Curiae in Support of Petitioners (dated Feb. 11, 2002), at 20-24. More generally, the United States has consistently advocated for the dismissal of *all* World War II forced labor claims on the ground that they must be resolved through intergovernmental negotiation. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 486 (D.N.J. 1999) ("The executive branch has always taken the position that claims arising out of World War II must be resolved through government-to-government negotiations.").

The United States' position is both correct and entitled to deference. Articles 4(a) and 26 of the 1951 Treaty "expressed a clear policy of resolving the claims of [non-signatory] nationals through government-to-government negotiation," *Joo*, 332 F.3d at 685, and that policy preempts state-law claims under Section 354.6. *Deutsch*, 324 F.3d at 714 n.14. Were there any doubt about the policy expressed in the 1951 Treaty, and there is not, "the meaning attributed to [it] by the Government . . . is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982).

The government's position is particularly persuasive in this case because both the United States and Japan agree that state-law claims under Section 354.6 conflict with the policies embodied in the 1951 Treaty. In a formal diplomatic protest to the United States Department of State, the Government of Japan explained that:

> Articles 4(a) and 26 of the Peace Treaty specifically provide that the claims of non-parties to the treaty such as China and Korea and those of their nationals were also to be addressed through government-to-government negotiations, not individual damage claims. However, the State of California established

> a mechanism where any person meeting the criteria set forth in section 354.6 can assert individual claims against Japanese nationals in California. [¶] If upheld, section 354.6 would nullify the provisions of the Peace Treaty. . . .

The Views of the Government of Japan on section 354.6 of Code of Civil Procedure of the State of California ¶¶ 4, 3, attached as exhibit B to the United States' Request for Judicial Notice, dated March 5, 2003. *See Taiheiyo Cement Corp. v. Super. Ct.*, 66 P.3d 1231, 133 Cal. Rptr. 2d 147 (Cal. 2003) (granting this request for judicial notice).

The fact that both the United States and Japan agree that the 1951 Treaty embodies a foreign policy at odds with Section 354.6 – and that the language of the Treaty accords with their mutual interpretation – makes the government's position especially persuasive: "When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." *Sumitomo Shoji*, 457 U.S. at 185; *see also Garamendi*, 540 U.S. at 424-25 (statements by U.S., German and Swiss governments that California's HVIRA frustrated the operation of the federal executive agreements were evidence that the California law was preempted).

The United States did not assert a contradictory position in the Superior Court, contrary to Jeong's argument. The government has consistently argued that all of Jeong's claims under California law are preempted by the federal government's exclusive authority over foreign relations, as embodied in the 1951 Treaty, and that any claims he might have had under federal law are long since time-barred. *E.g.*, Tab 36 at 1890; Tab 32. There is nothing "inconsistent" or "incoherent" in this position, *see* Petition at 20, and indeed the United States Court of Appeals for the Ninth Circuit agreed with the government. *See Deutsch*, 324 F.3d at 706-18 (holding Section

354.6 unconstitutional on foreign affairs grounds and holding claims under the federal Alien Tort Claims Act, 28 U.S.C. § 1350, time-barred).

3. Balancing State Interests

Jeong next criticizes the Court of Appeal for supposedly failing to balance "the national policy toward non-signatories embodied in the 1951 Treaty" against "California's traditional and powerful interest in administering litigation in its courts." Petition at 25-26. But Jeong is mistaken in claiming that *Garamendi* requires any such balancing. *Garamendi* held that "[t]he express federal policy and the clear conflict raised by the state statute are *alone* enough to require state law to yield." 540 U.S. at 425 (emphasis added). The Court of Appeal followed *Garamendi* and reached the same conclusion here. *Taiheiyo Cement*, 117 Cal. App. 4th at 394-96 (App. 19-22).

Jeong is also wrong in suggesting that the Court of Appeal did not consider the supposed state interests California had in adopting Section 354.6. Jeong contends that "Section 354.6 vindicates the right of individuals to seek redress of individual grievances," Petition at 26, and he argues that there is a "long history of state control of litigation, including litigation that involves disputes affected by war." *Id.* at 27.

Jeong ignores both the Court of Appeal's decision and *Garamendi*. The Court of Appeal acknowledged that Section 354.6 is designed to redress individual grievances, but held that is precisely why it is preempted: Section 354.6, "while noble, conflicts with the federal policy embodied in" the 1951 Treaty that the World War II claims of non-signatory nationals were to be resolved through diplomatic negotiation, not litigation. *Taiheiyo Cement*, 117 Cal. App. 4th at 396 (App. 22); *see also Garamendi*, 540 U.S. at 426-27 (acknowledging the "humanity" of California's interest in redressing the grievances of the estimated 100,000 Holocaust survivors living in the state, but

holding HVIRA preempted because of its "conflict with national policy").

Similarly, Jeong's assertion that states have a generalized ability to enact their own statutes of limitations[10] and interpret contracts with aliens, *see* Petition at 26-27, both ignores the reality of his claims and overstates the Court of Appeal's holding. Jeong is asserting a claim for war reparations. *See Deutsch*, 324 F.3d at 712. His attempt to analogize this lawsuit to a minimum wage claim or some other traditional exercise of the state's police power, *see* Petition at 26, borders on farcical. Section 354.6 does not apply *at all* to conduct that occurred in California or even in the United States. It applies only to forced labor claims in Axis-controlled territory during World War II. § 354.6(a)(1), (2) (App. 131). As *Garamendi* held, "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of *foreign policy* in which national, *not state*, interests are overriding." 540 U.S. at 421 (emphasis added).

Jeong also exaggerates the Court of Appeal's holding. The court did not question, or even address, a state's general ability to provide a forum for aliens to assert claims under

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10. Jeong's argument takes for its premise that Section 354.6 merely extends the statute of limitations on previously existing World War II claims. In fact, at least one California Court of Appeal, as well as the Ninth Circuit, have held that the statute actually "creates *new* claims that would not otherwise exist." *Mitsubishi Materials*, 113 Cal. App. 4th at 59 (emphasis original); *Deutsch*, 324 F.3d at 707-08. The Court of Appeal in this case found it unnecessary to decide whether Section 354.6 is procedural (as Jeong contends) or substantive (as all other courts have held) because under either interpretation, it "conflicts with the federal policy embodied in Articles 4(a), 14(b), and 26 of the 1951 Treaty" and is preempted. *Taiheiyo Cement*, 117 Cal. App. 4th at 396 (App. 22). Because Jeong's claims are for war reparations, they could never have been brought under state law prior to the adoption of Section 354.6, and the Petition is incorrect in describing the statute as an "extension" on the limitations period for some unspecified, previously nonexistent state-law claim. *See Mitsubishi Materials*, 113 Cal. App. 4th at 59.

international law. Rather, it held that Jeong's claims under Section 354.6 in this case are preempted because they conflict with the foreign policy embodied in the 1951 Treaty. *Taiheiyo Cement*, 117 Cal. App. 4th at 394-96 (App. 19-22).

In sum, the outcome of this case is dictated by *Garamendi*. None of petitioner's arguments warrants review.

III. ALTERNATIVE GROUNDS FOR DISMISSAL MAKE CERTIORARI INAPPROPRIATE

Certiorari is additionally inappropriate because the same outcome – dismissal of this case – is also required by other constitutional doctrines briefed in the courts below and not discussed in the Petition: the political question doctrine and due process limitations on the extraterritorial application of California law.

A. Political Question

Jeong's claims for war-time forced labor against enemy nationals, arising out of Japan's World War II conscription program, would require the courts of California to revisit and revise U.S. foreign policy toward compensation for the harms inflicted by Japan and its nationals during World War II. Any court purporting to undertake this task would place itself in conflict with the nation's foreign policy – which has strived for the resolution of World War II claims through bilateral negotiations, rather than piecemeal litigation – and would necessarily interject itself into an inherently political task, committed exclusively to the political branches of the federal government for resolution.

"The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative – 'the political' – departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); *see generally*

Baker v. Carr, 369 U.S. 186, 210-11 (1962). Following this Court's precedent, numerous courts have held that "forced labor claims arising out of World War II raise nonjusticiable political questions." *Iwanowa*, 67 F. Supp. 2d at 483; *Kelberine v. Societe Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966); *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 690-95 (N.D. Cal. 2003); *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 275-84 (D.N.J. 2001); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 272-85 (D.N.J. 1999); *compare Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1235 (11th Cir. 2004) (political question doctrine inapplicable where "the plain text" of federal executive agreements "anticipates that federal courts will consider claims").[11] Jeong's claims are similarly nonjusticiable.[12]

B. Due Process

Jeong's claims are also barred by the Due Process clause. All of his claims are based on California law, but due process forbids the application of California law to events occurring outside of the state between parties that, at the time, had no connection to California. *See Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228, 1238 (11th Cir. 2001).

Here, the conduct at issue is wholly unconnected to California. Jeong's claims arose more than a half-century ago on the other side of the world. Jeong himself had no connection

11. This application of the political question doctrine is binding on California state courts both as a matter of federal law, *see United States v. Pink*, 315 U.S. 203, 222-23 (1942) ("the conduct of foreign relations is committed by the Constitution to the political departments of the *Federal* Government") (emphasis added), and because California itself applies the political question doctrine in state court. *See, e.g., Spindulys v. Los Angeles Olympic Organizing Comm.*, 175 Cal. App. 3d 206, 209-10 (1985).

12. The Court of Appeal's original opinion rejected the political question doctrine, but did not discuss or purport to distinguish any of these precedents. *Taiheiyo Cement*, 129 Cal. Rptr. 2d at 470-72 (App. 66-69).

to California at the time – he was a Korean national (and Japanese subject) resident in Japan. His conscription and forced labor occurred entirely in Japan and what is now North Korea. Jeong does not allege that Taiheiyo's predecessor had any connection with California at the time, or that any of the California-based defendants even existed during World War II. None of the parties could "reasonably have anticipated that their actions would later be judged" by California law. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 327 (1981) (Stevens, J., concurring). Applying California law would be arbitrary and unfair – the hallmark of a denial of due process.[13]

IV. OBJECTIONS TO THE QUESTION PRESENTED FOR REVIEW

Finally, certiorari is inappropriate because the question on which Jeong seeks review is not presented by this case. *See* Supreme Ct. R. 15(2). The Petition seeks review of a California Court of Appeal decision holding preempted "a California law *extending the limitations period* for wartime labor and personal injury claims . . . where *the Treaty itself contains no express preemption*." Petition at i (emphasis added). That "Question Presented" inaccurately describes Section 354.6 and ignores the language of the 1951 Treaty. As noted above, California's Section 354.6 creates a new substantive cause of action for World War II forced labor; it is not merely an extension of the statute of limitations for some unspecified pre-existing claim. *See* n.10, *supra*. Further, Articles 4(a) and 26 do expressly embody a foreign policy that preempts Jeong's claims.

---

13. The Court of Appeal's original opinion rejected Taiheiyo's due process argument on the theory that Section 354.6 is merely an extension of the statute of limitations, and a state may apply its own statute of limitations to claims in its courts, even if the substance of the claims arose out of state. *Taiheiyo Cement*, 129 Cal. Rptr. 2d at 468-70 (App. 60-65). In its second opinion, the Court of Appeal retreated from its holding that Section 354.6 is merely an extension of the statute of limitations, noting instead that two appellate courts have held that it creates a new cause of action. *See* n.10, *supra*.

CONCLUSION

The Petition presents no basis for review. There is no conflict among the lower courts for this Court to resolve. *Garamendi* controls the outcome here, as the California Court of Appeal properly held.

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In The Supreme Court of the United States

JAE WON JEONG,

Petitioner,

v.

TAIHEIYO CEMENT CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Eight

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INTRODUCTION

Taiheiyo fails to dispel the importance of the issues presented. The decision below is inconsistent with *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), because it preempts a State law on the basis of a treaty without showing that a preemptive national policy is "expressed unmistakably" in the treaty – here, that contingent diplomacy between Japan and non-signatory countries would be the *exclusive* remedy for individual labor and personal injury claims. The court below adopts a reading of *Garamendi* that threatens fundamental values of federalism by impinging too far on the powers of the States to fashion rights and remedies in their own courts in traditional areas of State interest.

I. No Policy to Privilege Possible Diplomatic Negotiations with Third-Party Countries as Individuals' Exclusive Remedy is Expressed Unmistakably in the 1951 Treaty.

Unable to address the essential inquiry posed by *Garamendi* – that for an international agreement to preempt a State law, the preemptive policy must be "expressed unmistakably" by the Federal Government, 539 U.S. at 421 – Taiheiyo argues that article 4(a) of the 1951 Treaty is "the antithesis of" or is "incompatibl[e]" with Mr. Jeong's state court action for unpaid wages and personal injuries. (Opp. at 17.) Taiheiyo thus seems to revert to the express preemption theory rejected by the Court of Appeal in its first opinion. (*See* App. 42 ("Nothing in . . . the 1951 Treaty expressly preempts or bars claims by Korean nationals against Japanese corporations for unpaid labor or personal injuries suffered for slave or forced labor during WW II.").)

Article 4(a)'s exhortation of Japan to enter into negotiations with countries not party to the 1951 Treaty – under which "neither Korea nor Japan was required to implement any specific resolution" nor Korea "to even negotiate with Japan" (App. 42-43) – by itself hardly is an unmistakable expression that future claims by non-party nationals would thereby be extinguished. Yet that bare treaty language is all that the Court of Appeal relied on and all that Taiheiyo can cite. Taiheiyo does not even claim that anything like the exclusivity language woven into the express policies of the executive agreement in *Garamendi* (*see* Pet. at 15-16) exists here.

Thus, while the *Garamendi* agreement did not have a preemption clause (*see* Opp. at 18 (quoting 539 U.S. at 417)), authoritative statements made in connection with the agreement were replete with references that the German Foundation's and ICHEIC's procedures would be the "exclusive" remedies. *See* 539 U.S. at 422. To safeguard the prerogatives of the States and preserve the interests of federalism, nothing short of such explicit statements suffices under *Garamendi* to preempt State laws. Taiheiyo does not even pretend that they are present here.

Taiheiyo also fails to refute Mr. Jeong's showing that the Government has expressed contradictory views on the policy embodied in the 1951 Treaty, further undermining its view and that of the court below. (*See* Pet. at 18-21.) Taiheiyo argues again that the Government's admission that Mr. Jeong could have sued in the United States if only he had done so earlier applies only to claims "under *federal* law." (Opp. at 21 (emphasis added).) Mr. Jeong has already demonstrated that the Government's statements make no distinction between state and federal claims, and, even if they did, they would still be inconsistent with

Taiheiyo's asserted reading of the Treaty that diplomatic resolution of claims is the *exclusive* remedy under the Treaty.

Since the Government has conceded that Mr. Jeong could have sued earlier, *before* the expiration of statutes of limitations, there can be no bar to his suing now under California's *extension* of the statute. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 316 (1945) (Jackson, J.) (It is constitutional to "lift[ ] the bar of a statute of limitation so as to restore a remedy lost through mere lapse of time"). At the least, the Government's concession weakens its and Taiheiyo's broad claims.

Taiheiyo excuses the Court of Appeal's failure to take into account California's traditional and powerful interest in administering limitation in its courts and providing a forum for its citizens (*see* Pet. at 25-28) by asserting that, in *Garamendi*, "the express federal policy and the clear conflict raised by the state statute [were] alone enough to require state law to yield," 539 U.S. at 425, *quoted in* Opp. at 22. But *Garamendi did* have an express policy and this case does not.

Taiheiyo makes no argument – nor can it make one – that the court below engaged in any true balancing. Rather, it seeks to cover over the lacuna with rhetoric. Taiheiyo, however, does itself no service to say that it "borders on farcical" to analogize section 354.6 to other "traditional exercise[s] of the state's police power." (Opp. at 23.) The first opinion of the Court of Appeal stated that the statute was precisely such an exercise. (App. 55.)

II. The Decision Below Allows the Executive's Litigation Tactics to Vitiate State Laws.

Taiheiyo attempts to avoid the grave separation of powers and federalism concerns raised by the Court of Appeal's holding by pretending they don't exist. But ignoring the court's dangerous misreading of *Garamendi* does not make the problem go away. As explained above, the 1951 Treaty does not expressly or impliedly preempt claims by non-signatory nationals like Mr. Jeong. For this reason, Taiheiyo is really asking this Court to uphold preemption of a State law based solely on the Executive Branch's statement of policy in the context of this litigation. Indeed, Taiheiyo is asking this Court to sweep aside a law passed by the California Legislature based on the *latest* statement of policy from the Executive.

But reading *Garamendi* to compel such deference to the Executive Branch in the interpretation of the "policy" behind a treaty undermines both separation of powers and federalism principles. Uncritical deference to the Executive as to a policy embodied in a Treaty essentially removes the Senate's ability under Article II to act as a check on the Executive's treaty-making power. Instead, the Senate's advice and consent would become a mere formality after which the Executive would have complete control over the "policy" embodied in the treaty no matter what was actually contained in the treaty.

Undermining the Senate's power to review the executive's treaties also removes a crucial protection for the autonomy of the States. The "principal means chosen by the Framers to preserve the States in the constitutional system lies in the structure of the Federal Government itself." *Garcia v. San Antonio Metro. Transit Auth.*, 469

U.S. 528, 550 (1985). The Framers gave the States a central role in choosing representatives in each house of the legislature, especially the Senate. *Id.* at 551. By transferring the absolute authority to interpret a treaty's policy to the Executive, without first determining that this policy is "expressed unmistakably" in that treaty, the Court of Appeal undercuts this fundamental constitutional structure by allocating the power to preempt state law to the Executive alone free from the political checks and balances provided by the Senate.

III. Earlier Cases Do Not Definitively Resolve the Important Issues Presented.

Taiheiyo argues that "the petition should be denied because there is no conflict to resolve." (Opp. at 12 (type case changed).) One of its two cases is off point; the second deals with the issues in only a glancing fashion. The cases underscore that the Court should grant certiorari, so that the important issues presented can be definitively addressed.

In *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.), *cert. denied sub nom. Kim v. Ishikawajima Harima Heavy Indus., Ltd.*, 540 U.S. 820 (2003), the treatment of the issues of non-signatory nationals was both cursory and incorrect. *Deutsch* was a consolidated MDL case that involved American POW's, people enslaved by German companies, and civilians enslaved by Japanese companies. *Deutsch* relegated its discussion of the latter to a footnote:

> It is immaterial that many of the Appellants are nationals of two nations, China and Korea, that were not signatories of the San Francisco treaty. When the United States has been a party to a

> war, the resolution it establishes to that war is the resolution for the whole of the United States. States lack the power to modify that resolution, regardless of the citizenship of those seeking redress.

Id. at 714 n.14. We know what the United States' "resolution" was for *signatory* nationals – their claims were waived. *See Mitsubishi Maters. Corp. v. Superior Court (Dillman)*, 113 Cal. App. 4th 55, 79, 6 Cal. Rptr. 3d 159, 178 (2003) ("[t]he 1951 treaty is express in not allowing" claims of U.S. nationals). The *Deutsch* court's assertion, however, does not elucidate the question of what the "resolution" was for *non-signatory* nationals. The lack of a reasoned analysis makes this aspect of the decision of little applicability. Moreover, *Deutsch* was decided before *Garamendi*, and so does not use its approach.

The second case, *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), *vacated*, 124 S. Ct. 2835 (2004), was against the Government of Japan, which was "entitled to [sovereign] immunity." *Id.* at 680. The respondents here are private companies. In any event, the judgment in *Hwang Geum Joo* has been vacated, and the case is now under reconsideration.

IV. Taiheiyo's "Alternative Grounds" Are of No Merit.

Taiheiyo raises, as "alternative grounds" two issues that were not treated in the Court of Appeal's opinion under review, but which were correctly decided *against* Taiheiyo in the court's first opinion (*see* Opp. at 25 n.12, 26 n.13).

A. Political question.

Taiheiyo submits that cases involving foreign relations are "'not subject to judicial inquiry or decision.'" (Opp. at 24 (quoting *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918))). This "sweeping statement[]" notwithstanding, however, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). [1]

Deutsch, indeed, recognized that "[t]he problem with this argument is that it makes every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs." 324 F.3d at 713. Courts "cannot shirk" the "responsibility" to "construe treaties and executive agreements" "merely because our decision may have significant political overtones." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986).

Moreover, this is "an ordinary tort suit," and the department to which it is "'constitutionally committed' is none other than our own – the Judiciary." *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991). "This factor alone . . . strongly suggests that the political question doctrine does not apply." *Id.* [2]

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[1] Although Taiheiyo asserts that the political question doctrine "is binding" on state courts (Opp. at 24), the political question doctrine derives from the limits Article III imposes on *federal* courts. *See, e.g., Allen v. Wright*, 468 U.S. 737, 750 (1984).

[2] In the German litigation (*see* Opp. at 25), the courts viewed themselves as asked to "to structure a reparations scheme." *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999); *see also Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999). (*But*

(Continued on following page)

B. Due Process.

Section 354.6 allows a forum for California residents to bring claims for unpaid labor and personal injury against corporations doing business in California. This does not offend due process.

Taiheiyo claims that "[a]pplying California law would be arbitrary and unfair." (Opp. at 26). It is not, however, "'arbitrary or unfair'" to apply the forum State's statute of limitations, even where the underlying claims "are and must be governed by the law of a different State." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 730, 722 (1988). Remedies are also "generally regarded as with the forum State's legislative jurisdiction." *Id.* at 728. Section 354.6 does not even provide the substantive rules of decision; these would be selected under California choice of law rules.

This is a personal lawsuit for compensation by a California resident against companies doing business in California. *Cf. Gerling Global Reinsurance Corp. of Am. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001) (involving the

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see, e.g., The Paquete Habana, 175 U.S. 677 (1900) (awarding damages to Spaniards whose vessels were unlawfully seized by the U.S. during war).) That is not what Mr. Jeong seeks. Moreover, while the appeals in those cases were pending, they and other German slave labor claims were resolved in connection with the creation of a $5 billion foundation.

Kelberine v. Société Internationale, Etc., 363 F.2d 989, 995 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 989 (1966), held that a case seeking damages to all who had suffered at the hands of the Nazis was "too vague," "too indefinite," and "too complicated." *See also Alperin v. Vatican Bank*, 242 F. Supp. 2d 686, 694-95 (N.D. Cal. 2003) ("plaintiffs . . . seek . . . the undetermined value of property stolen in untold ways in a multiplicity of regions by both military personnel and civilians"). Mr. Jeong alleges specific wrongs by a single corporation during a limited time.

"extremely narrow" issue of the validity of a subpoena served by a state insurance commissioner, not the procedural rules for a state's courts, where no Florida insured was a party).

Nor has Taiheiyo identified any conflicting law – law that *denies* compensation for labor and personal injury. Absent such conflict, "there can be no injury in applying [California] law." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 816 (1985). In any event, California has a sufficient aggregation of contacts – for example, Mr. Jeong lives in California, and Taiheiyo is alleged to do business there – to ensure that application of its law is not arbitrary. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313-19 (1981). And the California Legislature found that California has "a moral and public policy interest in assuring that its residents and citizens have a reasonable opportunity to claim their entitlement to compensation." 1999 Cal. Stat. ch. 216, § 1 (App. 132-33).

There is no constitutional warrant to displace the California Legislature's determination that Mr. Jeong's claims can be adjudicated in California.

CONCLUSION

A writ of certiorari should be granted.

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